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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **DEFENDANTS' NOTICE OF LODGMENT OF CALIFORNIA CASES IN SUPPORT OF DEFENDANTS' RESPONSE TO COURT'S ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** **EXHIBITS 1 THROUGH 6** Date: June 17, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

On behalf of the Defendants in this case, the City of San Diego hereby lodges the following documents in support of their Response to the Court's Order to Show Cause re Preliminary Injunction:

CASES (STATE)

EXHIBIT 1:	*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal. 3d 582
EXHIBIT 2:	*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785
EXHIBIT 3:	*Birkenfield v. City of Berkley* (1976) 17 Cal. 3d 129
EXHIBIT 4:	*Briggs v. Lawrence* (1991) 230 Cal. App. 3d 605
EXHIBIT 5:	*Corona Norco Unified School Dist. V. City of Corona,* (1993) 17 Cal. App. 4th 985, 994
EXHIBIT 6:	*deBottari v. City Council,* (1985) 171Cal. App. 3d 1204, 1213

Dated:

MICHAEL J. AGUIRRE, City Attorney

By /s/ Carmen Brock
DONALD McGRATH
CARMEN BROCK
Deputy City Attorney

Attorneys for Defendants Kelly Broughton, Development Services Department of the City of San Diego, Afsaneh Ahmadi, and The City of San Diego

EXHIBIT 1

Supreme Court of California,
In Bank.
ASSOCIATED HOME BUILDERS OF the GREATER EASTBAY, INC., Plaintiff and Respondent,
v.
CITY OF LIVERMORE et al., Defendants and Appellants.
S.F. 23222.

Dec. 17, 1976.

Appeal was taken from an order of Superior Court, Alameda County, Lyles E. Cook, J., enjoining enforcement of a local zoning ordinance, adopted by initiative, which prohibited issuance of further residential building permits in the municipality until local educational, sewage disposal, and water supply facilities complied with specified standards. The Supreme Court, Tobriner, J., held that statutes requiring notice and hearing to precede enactment of municipal zoning and land use ordinances do not apply to ordinances enacted by initiative; that the ordinance, when interpreted to incorporate standards established by the local joint school district and the regional water quality control board, was not unconstitutionally vague; that the failure of the ordinance to designate the person or agency who determined when its standards had been fulfilled did not make it unconstitutionally vague; that the ordinance need not be sustained by a compelling state interest, but would be constitutional if reasonably related to the welfare of the region affected; and that the ordinance's presumption of constitutionality under the police powers could not be overcome on the basis of the limited record presented.

Reversed and remanded.

Clark, J., dissented and filed an opinion.

Mosk, J., dissented and filed an opinion.

Opinion, Cal.App., 116 Cal.Rptr. 326, vacated.

West Headnotes

[1] **Statutes 302**
361k302Most Cited Cases
(Formerly 92k26)

[1] **Statutes 342**
361k342Most Cited Cases
(Formerly 92k26)
Amendment to California Constitution in 1911 to provide for initiative and referendum speaks of initiative and referendum, not as right granted to people, but as power reserved by them. West's Ann.Const. art. 4, § 1 [now § 25].

[2] **Statutes 302**
361k302Most Cited Cases
Although procedures for exercise of right of initiative are spelled out in initiative law, right itself is guaranteed by Constitution. West's Ann.Elections Code, §§ 4000-4023; West's Ann.Const. art. 4, § 1 [now § 25].

[3] **Municipal Corporations 108.2**
268k108.2Most Cited Cases
Notice and hearing provisions of Zoning Act of 1917 do not apply to zoning ordinances enacted by initiative; overruling Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308, and disapproving language in other decisions asserting that general law cities cannot adopt zoning ordinances by initiative. West's Ann.Gov.Code, §§ 65850, 65853-65857; West'sAnn.Elections Code, § 4000 et seq.

[4] **Zoning and Planning 28**
414k28Most Cited Cases
Municipal zoning ordinance enacted by initiative prohibiting issuance of further residential building permits until local educational facilities eliminated double sessions and "overcrowded classrooms as determined by the California Education Code," and until sewage disposal and water supply facilities complied with specified standards, was not unconstitutionally vague, even though Education Code contains no definition of "overcrowded classrooms," where ordinance could be interpreted to incorporate standards adopted by local joint school district, pursuant to authority granted it by Education

Code, for determining whether schools are overcrowded. West's Ann.Education Code, § 1052.

[5] **Constitutional Law** ⚷**990**
92k990Most Cited Cases
(Formerly 92k48(1))

[5] **Constitutional Law** ⚷**1013**
92k1013Most Cited Cases
(Formerly 92k48(1))
Enactments should be interpreted when possible to uphold their validity; court should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague.

[6] **Statutes** ⚷**47**
361k47Most Cited Cases
Statute otherwise uncertain will be upheld if its terms may be made reasonably certain by reference to any definable sources.

[7] **Municipal Corporations** ⚷**108.2**
268k108.2Most Cited Cases
Zoning ordinance adopted by initiative prohibiting issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards was not void on theory that it failed to designate what agency or person determined whether such standards had been achieved since, because ordinance governed issuance or denial of residential building permits, standards must be directed in first instance to city building inspector, who is charged with duty of issuing or denying such permits, and whose duties are ministerial in character and can be reviewed by writ of mandamus; thus ultimate decision as to compliance with standards will be rendered by court.

[8] **Zoning and Planning** ⚷**611**
414k611Most Cited Cases
Land use restriction withstands constitutional attack if it is fairly debatable that restriction in fact bears reasonable relation to general welfare.

[9] **Zoning and Planning** ⚷**68**
414k68Most Cited Cases
Constitutionality of local land use restriction which significantly affects residents of surrounding communities, must be measured by its impact not only upon welfare of enacting community, but upon welfare of surrounding region; proper constitutional test is one which inquires whether ordinance reasonably relates to welfare of those whom it significantly affects.

[10] **Zoning and Planning** ⚷**674**
414k674Most Cited Cases
Exclusionary local zoning ordinance, prohibiting issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards, carried presumption of constitutionality and such presumption could not be overcome on grounds that ordinance fell beyond proper scope of police power where record was devoid of evidence concerning probable impact and duration of ordinance's restrictions; on limited record, court could not determine whether ordinance reasonably related to general welfare of region it affected.

[11] **Constitutional Law** ⚷**1281**
92k1281Most Cited Cases
(Formerly 92k83(4.1), 92k83(4), 92k83(1))
Indirect burden upon right to travel imposed by local exclusionary zoning ordinance which prohibited further issuance of residential building permits until local educational, sewage disposal and water supply facilities complied
with specified standards did not call for strict judicial scrutiny of ordinance or require that compelling state interest be shown in order to sustain ordinance; validity of ordinance would be measured by traditional test for validity of land use restrictions enacted under municipal police power.

[12] **Constitutional Law** ⚷**1281**
92k1281Most Cited Cases
(Formerly 92k83(4.1), 92k83(4), 92k83(1))
Ordinance which has effect of limiting migration to community does not necessarily abridge fundamental right to travel, and thus should not be examined by compelling interest standard unless it infringes some other fundamental right or discriminates on suspect basis.

[13] **Zoning and Planning** ⚷**68**
414k68Most Cited Cases
Local land use restriction lies within authority of police power if it is reasonably related to public welfare.

[14] **Municipal Corporations** 🔑**122.1(2)**
268k122.1(2)Most Cited Cases
(Formerly 268k122(2))
In deciding whether challenged ordinance reasonably relates to public welfare, courts recognize that such ordinances are presumed to be constitutional and come before court with every intendment in their favor.

[15] **Municipal Corporations** 🔑**121**
268k121Most Cited Cases
In ascertaining whether challenged ordinance reasonably relates to regional welfare, extent and bounds of region significantly affected by ordinance should be determined as question of fact by trial court.

[16] **Municipal Corporations** 🔑**121**
268k121Most Cited Cases
In determining whether challenged restriction reasonably relates to regional welfare, court should: forecast probable effect and duration of restriction; identify competing interests affected by restriction; and determine whether ordinance, in light of its probable impact, represents reasonable accommodation of competing interests.

[17] **Municipal Corporations** 🔑**63.20**
268k63.20Most Cited Cases
(Formerly 268k63.2)
In determining whether local restrictive ordinance reasonably relates to regional welfare, judicial deference to judgment of municipality's legislative body is not judicial abdication; although in many cases it will be fairly debatable that ordinance reasonably relates to regional welfare, it cannot be assumed that land use ordinance can never be invalidated as enactment in excess of police power.

[18] **Municipal Corporations** 🔑**122.1(2)**
268k122.1(2)Most Cited Cases
(Formerly 268k122(2))
Party challenging constitutionality of ordinance has burden of presenting evidence and documentation which court will require in undertaking constitutional analysis.
58743**475** Maurice Engel, Hayward, for defendants and appellants.

Richard J. Fink, Berkeley, as amicus curiae on behalf of defendants and appellants.

Robert C. Burnstein, Oakland, for plaintiff and respondent.

***588** TOBRINER, Justice.

We face today the question of the validity of an initiative ordinance enacted by the voters of the City of Livermore which prohibits issuance of further residential building permits until local educational, sewage disposal, and water supply facilities comply with specified standards. [FN1] Plaintiff, an association of contractors, subdividers, and other persons interested in residential construction in Livermore, brought this suit to enjoin enforcement of the ordinance. The superior court issued a permanent injunction, and the city appealed.

FN1. For the history of the events leading to the enactment of the Livermore ordinance see Stanford Environmental Law Society, A Handbook for Controlling Local Growth (1973) pages 90--96; Deutsch, Land Use Growth Controls: A Case Study of San Jose and Livermore, California (1974) 15 Santa Clara Law. 1, 12--14.

In Hurst v. City of Burlingame (1929) 207 Cal. 134, 277 P. 308, we held that statutes requiring notice and hearing to precede enactment of municipal zoning and land use ordinances applied to initiatives, a holding which effectively denied voters of general law cities the power to enact such legislation by initiative. In accord with that precedent, the trial court here held that Livermore, as a general law city, lacked authority to enact the initiative ordinance at issue. We have concluded, however, that Hurst was incorrectly decided; the statutory notice and hearing provisions govern only ordinances enacted by city council action and do not limit the power of municipal electors, reserved to them by the state Constitution, to enact legislation by initiative. We therefore reverse the trial court holding on this issue.

We also reject the trial court's alternative holding that the ordinance is unconstitutionally vague. By interpreting the ordinance to incorporate standards established by the Livermore Valley Joint School District and the Regional Water Quality Control Board, we render its terms sufficiently specific to comply with constitutional requisites. The failure of the ordinance to designate the person or agency who determines when its standards have been fulfilled does not make it unconstitutionally vague; the duty to enforce the ordinance reposes in the city's building inspector, whose decisions are subject to judicial review by writ of mandamus.

Finally, we reject plaintiff's suggestion that we sustain the trial court's injunction on the ground that the ordinance unconstitutionally attempts ***589** to bar immigration to Livermore. Plaintiff's contention symbolizes the growing conflict between the efforts of suburban communities to check disorderly development, with its concomitant problems of air and water pollution and inadequate public facilities, and the increasing public need for adequate housing opportunities. ****476***44** We take this opportunity, therefore, to reaffirm and clarify the principles which govern validity of land use ordinances which substantially limit immigration into a community; we hold that such ordinances need not be sustained by a compelling state interest, but are constitutional if they are reasonably related to the welfare of the region affected by the ordinance. Since on the limited record before us plaintiff has not demonstrated that the Livermore ordinance lacks a reasonable relationship to the regional welfare, we cannot hold the ordinance unconstitutional under this standard.

1. Summary of proceedings.

The initiative ordinance in question was enacted by a majority of the voters at the Livermore municipal election of April 11, 1972, and became effective on April 28, 1972. The ordinance, set out in full in the margin, [FN2]***590** states that it was enacted to further the health, safety, and welfare of the citizens of Livermore and to contribute to the solution of air pollution. Finding that excessive issuance of residential building permits has caused school overcrowding, sewage pollution, and water rationing, the ordinance prohibits issuance of further permits until three standards are met: '1. EDUCATIONAL FACILITIES--No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code. 2. SEWAGE--The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board. 3. WATER SUPPLY--No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.'

> FN2. The initiative provides as follows:
> 'INITIATIVE ORDINANCE RE BUILDING PERMITS
> 'An ordinance to control residential building permits in the City of Livermore:
> 'A. The people of the City of Livermore hereby find and declare that it is in the best interest of the City in order to protect the health, safety, and general welfare of the citizens of the city, to control residential building permits in the said city. Residential building permits include single-family residential, multiple residential, and trailer court building permits within the meaning of the City Code of Livermore and the General Plan of Livermore. Additionally, it is the purpose of this initiative measure to contribute to the solution of air pollution in the City of Livermore. 'B. The specific reasons for the proposed position are that the undersigned believe that the resulting impact from issuing residential building permits at the current rate results in the following problems mentioned below. Therefore no further residential permits are to be issued by the said city until satisfactory solutions, as determined in the standards set forth, exist to all the following problems:
> '1. EDUCATIONAL FACILITIES--No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code.
> '2. SEWAGE--The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board.
> '3. WATER SUPPLY--No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.
> 'C. This ordinance may only be amended or repealed by the voters at a regular municipal election.
> 'D. If any portion of this ordinance is declared invalid the remaining portions are to be considered valid.'

Plaintiff association filed suit to enjoin enforcement of the ordinance and for declaratory relief. After the city filed its answer, all parties moved for judgment on the pleadings and stipulated that the court, upon the pleadings and other documents submitted, could determine the merits of the cause. On the basis of that stipulation the court rendered findings and entered judgment for plaintiff. The city appeals from that judgment.

2. The enactment of the Livermore ordinance by initiative does not violate the state zoning law.

The superior court found that the initiative ordinance was adopted 'without complying with the statutes . . . governing general law cities,' specifically Government Code sections 65853 through 65857. These sections provide that any ordinance which changes zoning or imposes a land use restriction listed in ****477***45**Government Code section 65850 can be enacted only after noticed hearing before the city's planning commission and legislative body. [FN3] The superior court concluded that notice and ***591** hearing must precede enactment of any ordinance regulating land use. Since Livermore passed its ordinance pursuant to the procedures specified in the statutes governing municipal initiatives (Elec.Code, s 4000 et seq.), which do not provide for hearings before the city planning commission or council, the court held the ordinance invalid.

FN3. Government Code section 65853 provides in part that: 'A zoning ordinance or an amendment to a zoning ordinance, which amendment changes any property from one zone to another or imposes any regulation listed in Section 65850 not theretofore imposed or removes or modifies any such regulation therefore imposed shall be adopted in the manner set forth in Sections 65854 to 65857, inclusive. Any other amendment to a zoning ordinance may be adopted as other ordinances are adopted.' Section 65854 provides for notice and hearing before the planning commission. Section 65855 requires the commission to render a written recommendation to the city legislative body. Section 65856 requires a noticed public hearing before the legislative body. Finally, section 65857 authorizes the city legislative body to approve, modify, or disapprove the ordinance, but provides that no modification of the ordinance not previously considered by the planning commission can be adopted without first referring that matter to the commission.

[1] The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. [FN4] Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. [FN5] Declaring it 'the duty of the courts to jealously guard the right of the people' (Martin v. Smith (1959) 176 Cal.App.2d 115, 117, 1 Cal.Rptr. 307, 309), the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' (Mervynne v. Acker, supra, 189 Cal.App.2d 558, 563, 11 Cal.Rptr. 340, 344). '(I)t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' (Mervynne v. Acker, supra, 189 Cal.App.2d 558, 563--564, 11 Cal.Rptr. 340, 344;Gayle v. Hamm, supra, 25 Cal.App.3d 250, 258, 101 Cal.Rptr. 628.) [FN6]

FN4. See Note, The Scope of the Initiative and Referendum in California (1966) 54 Cal.L.Rev. 1717.

FN5. See Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal.3d 225, 231, 118 Cal.Rptr. 158, 529 P.2d 582;Blotter v. Farrell (1954) 42 Cal.2d 804, 809, 270 P.2d 481;Ley v. Dominguez (1931) 212 Cal. 587, 593, 299 P. 713;Dwyer v. City Council (1927) 200 Cal. 505, 513, 253 P. 932;Gayle v. Hamm (1972) 25 Cal.App.3d 250, 258, 101 Cal.Rptr. 628;Mervynne v. Acker (1961) 189 Cal.App.2d 558, 563, 11 Cal.Rptr. 340.

FN6. See Farley v. Healey (1967) 67 Cal.2d 325, 328, 62 Cal.Rptr. 26, 431 P2d 650;McFadden v. Jordan (1948) 32 Cal.2d 330, 332, 196 P.2d787;Gage v. Jordan (1944) 23 Cal.2d 794, 799, 147 P.2d 387; cf.

Hunt v. Mayor & Council of Riverside (1948) 31 Cal.2d 619, 628, 191 P.2d 426 (referendum).

The 1911 amendment, in reserving the right of initiative to electors of counties and cities, authorized the Legislature to establish procedures to facilitate the exercise of that right. [FN7] Accordingly the Legislature enacted ***592** statutes, now codified as sections 4000--4023 of the Election Code, providing for the circulation of petitions, the calling *****46**478** of elections, and other procedures required to enact an initiative measure.

FN7. The initiative and referendum amendment, formerly article IV, section 1, of the California Constitution, stated in part that 'The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law. . . . This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved.' This language was repealed in 1966 and replaced by article IV, section 258 which provides that 'Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.'

The 1911 amendment was first applied to zoning matters in 1927 in Dwyer v. City Council, supra, 200 Cal. 505, 253 P. 932, in which the court mandated the Berkeley City Council to submit a zoning ordinance to referendum. The opinion reasoned that since the city council had the legislative authority to enact zoning ordinances, the people had the power to do so by initiative or referendum. Rejecting an argument that the referendum procedure denied affected persons the right, granted them by municipal ordinance, to appear before the city council and state their views on the ordinance, the court replied that 'the matter has been removed from the forum of the Council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens . . .. It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirements . . ..' (200 Cal. at p. 516, 253 P. at p. 936.)

Two years later the court decided Hurst v. City of Burlingame, supra, 207 Cal. 134, 277 P. 308, the decision on which the trial court in the instant case based its ruling. The City of Burlingame had enacted by initiative a city-wide zoning ordinance which classified as residential the property where plaintiff had a retail store. Contending that he had been denied the right to a public hearing established in the Zoning Act of 1917 (Stats.1917, p. 1419), plaintiff sued to enjoin enforcement of the ordinance. Beginning with the premise that 'an ordinance proposed by the electors of a county or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact . . .' (207 Cal. at p. 140, 277 P. at p. 311), the Hurst court reasoned that since the board of trustees of the City of Burlingame could not lawfully enact a zoning ordinance without complying with the hearing requirement of the state law, the voters could not adopt such an ordinance by initiative.

***593** Responding to the argument that the enactment of the ordinance complied with the state initiative law, the court stated that 'The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope.' (P. 141, 277 P. at 311.) Finally, the court distinguished Dwyer v. City Council, supra, 200 Cal. 505, 253 P. 932, on the ground that Dwyer upheld a referendum, and thus persons affected by the referendum had already been granted a right to notice and hearing at the time of the original enactment of the ordinance. (See 207 Cal. p. 142, 277 P. 308.)

Although Hurst thus held the Burlingame initiative invalid for noncompliance with the state zoning law, the court added a constitutional dictum, asserting that 'the statutory notice and hearing . . . becomes necessary in order to satisfy the requirements of due process . . ..' (P. 141, 277 P. at p. 311.) In later years this constitutional dictum overshadowed the statutory holding of Hurst. Courts and commentators alike questioned Hurst's statutory holding, [FN8] but reexamination of that holding seemed pointless if the landowner's right to notice and hearing derived from constitutional compulsion independent of statute. [FN9]

FN8. See Taschner v. City Council (1973) 31 Cal.App.3d 48, 65, 107 Cal.Rptr. 214;Bayless v. Limber (1972) 26 Cal.App.3d 463, 469, footnote 5,102 Cal.Rptr. 647; Hagman et al., California Zoning Practice (Cont.Ed.Bar 1969) page 105.

FN9. See discussion in Taschner v. City Council, supra, 31 Cal.App.3d 48, 65, 107 Cal.Rptr. 214.

Two years ago, however, in San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 205, 216, 118 Cal.Rptr. 146, 529 P.2d 570 (app. dismissed, *****47**479**427 U.S. 901, 96 S.Ct. 3184, 49 L.Ed.2d 1195 (1976) we expressly disapproved the constitutional dictum of Hurst and later decisions. We held that a city violates no constitutional prohibition in enacting a zoning ordinance without notice and hearing to landowners, and hence may do so by initiative. (13 Cal.3d at pp. 217--218,118 Cal.Rptr. 146, 529 P.2d 570.) That decision clears the way for a long-needed reconsideration of the actual holding of Hurst that bars a general law city from enacting a zoning ordinance by initiative.

At first glance it becomes apparent that something must be wrong with the reasoning in Hurst. Starting from a premise of equality--that the voters possess only the same legislative authority as does the city ***594** council-- Hurst arrived at the conclusion that only the council and not the voters had the authority to enact zoning measures. Thus in the name of equality Hurst decrees inequality. The errors which lead to this non-sequitur appear after further analysis.

First, Hurst, erroneously contriving a conflict between state zoning statutes and the initiative law, set out to resolve that presumed conflict. [FN10] No conflict occurs, however; the Legislature never intended the notice and hearing requirements of the zoning law to apply to the enactment of zoning initiatives. (See Comment, The Initiative and Referendum's Use in Zoning (1976) 64 Cal.L.Rev. 74, 104--105.) The Legislature plainly drafted the questioned provisions of the zoning law with a view to ordinances adopted by vote of the city council; the provisions merely add certain additional procedural requirements to those already specified in Government Code sections 36931--36937 for the enactment of ordinances in general. Procedural requirements which govern Council action, however, generally do not apply to initiatives, [FN11] any more than the provisions of the initiative law govern the enactment of ordinances in council. No one would contend, for example, that an initiative of the people failed because a quorum of councilmen had not voted upon it, any more than one would contend that an ordinary ordinance of a council failed because a majority of voters had not voted upon it.

FN10. 'The fundamental test as to whether statutes are in conflict with each other is the legislative intent. If it appears that the statutes were designed for different purposes, they are not irreconcilable, and may stand together.' (People v. Lustman (1970) 13 Cal.App.3d 278, 288, 91 Cal.Rptr. 548, 555;Rudman v. Superior Court (1973) 36 Cal.App.3d 22, 27, 111 Cal.Rptr. 249.)

FN11. See Blotter v. Farrell, supra, 42 Cal.2d 804, 270 P.2d 481;Bayless v. Limber, supra, 26 Cal.App.3d 463, 469, footnote 5,102Cal.Rptr. 647.
In Galvin v. Board of Supervisors (1925) 195 Cal. 686, 235 P. 450, we held that the County of Contra Costa could not by initiative award a franchise for a toll bridge spanning navigable waters to neighboring Solano County without complying with statutory requirements for advance approval by the state engineer and a public hearing. The exceptional character of the statute involved in Galvin, which permitted one county to legislate on a matter which otherwise might require joint action of the state and both the counties affected, but permitted that action only if the legislating county complied with requirements designed to protect the interests of the state and the neighboring county, distinguishes Galvin from the present case.

[2] In the second place, Hurst, in treating the case as

one involving a conflict between two statutes of equal status--the zoning law and the initiative law--overlooked a crucial distinction: that although the procedures for exercise of the right of initiative are spelled out in the ***595** initiative law, the right itself is guaranteed by the Constitution. The 1911 constitutional amendment, in reserving the right of initiative on behalf of municipal voters, stated that 'This section is self-executing, but legislation may be enacted to facilitate its operation, But in no way limiting or restricting either the provisions of this section or The powers herein reserved.' (Former Cal.Const., art. IV, s 1.) (Emphasis added.) [FN12]*****48**480** Although the Legislature can specify the manner in which general law cities enact ordinances restricting land use, [FN13] legislation which permits council action but effectively bars initiative action may run afoul of the 1911 amendment. (See Comment, Op. cit., supra, 64 Cal.L.Rev. 74, 102.) Thus the notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful constitutionality; all such doubt dissolves in the light of an interpretation which limits those requirements to ordinances enacted by city councils.

FN12. Article IV of the California Constitution was revised in 1966. The right of municipal initiative now appears in section 25, which states simply that 'Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.' The 1966 constitutional revision was intended solely to shorten and simplify the Constitution, deleting unnecessary provisions; it did not enact any substantive change in the power of the Legislature and the people. The drafters of the revision expressly stated that they proposed deletion of the clauses barring the Legislature from restricting the reserved power of municipal initiative solely on the ground that it was surplusage, and that the deletion would be made 'without, in the end result, changing the meaning of the provisions.' (Cal.Const. Revision Com. (1966) proposed Revision of the Cal.Const., pp. 49--50.)

FN13. Article XI, section 2 of the California Constitution authorizes the Legislature to 'provide for city powers'; article XI, section 7 states that a 'city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations Not in conflict with general laws.' (Emphasis added.)

The fact that the zoning law is a special statute will not support Hurst; special legislation is still subject to constitutional limitations. If, for example, a 'special' statute were enacted prohibiting criticism of a named official, such as the Vice-President, it would not be deemed controlling over the First Amendment on the ground that the latter is 'general in its scope.' Indeed if the constitutional power reserved by the people can be abridged by special statutes, then by enacting a host of special statutes the Legislature could totally abrogate that power.

Finally, Hurst erred in distinguishing Dwyer v. City Council, supra, 200 Cal. 505, 253 P. 932, on the ground that Dwyer involved a referendum on a zoning ordinance; as Dwyer itself pointed out, 'if the right of referendum can be invoked, the corollary right to initiate legislation must be conceded to exist.' (200 Cal. at p. 511, 253 P. at p. 934.)

***596**[3] Thus both precedent and established principles of judicial construction dictate the conclusion that Hurst erred in holding the notice and hearing provisions of the Zoning Act of 1917 applied to zoning ordinances enacted by initiative. Resting upon the precepts that statutes which are apparently in conflict should, if reasonably possible, be reconciled (see, e.g., Warne v. Harkness (1963) 60 Cal.2d 579, 588, 35 Cal.Rptr. 601, 387 P.2d 377;Pacific Motor Transport Co. v. State Bd. of Equalization (1972) 28 Cal.App.3d 230, 235, 104 Cal.Rptr. 558); that a statute should be construed to 'eliminate . . . doubts as to the provision's constitutionality' (In re Kay (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 694, 464 P.2d 142, 150); that the initiative power must be broadly construed, resolving all doubts in favor of the reserved power (see cases cited p. 45 of 135 Cal.Rptr., p. 477 of 557 P.2d, Ante, and fn. 6), we resolve that Hurst v. Burlingame, supra, 207 Cal. 134, 277 P. 308, was incorrectly decided and is therefore overruled. [FN14]

FN14. We also disapprove language in the

following decisions which, relying on Hurst v. City of Burlingame, supra, assert that general law cities cannot adopt zoning ordinances by initiative: Johnston v. City of Claremont (1958) 49 Cal.2d 826, 837, 323 P.2d 71 (dictum); Taschner v.City Council, supra, 31 Cal.App.3d 48, 61--65, 107 Cal.Rptr. 214;People's Lobby, Inc. v. Board of Supervisors (1973) 30 Cal.App.3d 869, 872--873, 106 Cal.Rptr. 666;Laguna Beach Taxpayers' Assn. v. City Council (1960) 187 Cal.App.2d 412, 415, 9 Cal.Rptr. 775.
We distinguish those decisions which bar the use of the initiative and referendum in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state. (Housing Authority v. Superior Court (1950) 35 Cal.2d 550, 219 P.2d 457;Simpson v. Hite (1950) 36 Cal.2d 125, 222 P.2d 225;Riedman v. Brison (1933) 217 Cal. 383, 18 P.2d 947; cf. Hughes v. City of Lincoln (1965) 232 Cal.App.2d 741, 43 Cal.Rptr. 306.) In enacting the instant ordinance, the voters of Livermore were acting in a legislative, not an administrative, capacity. (See San Diego Bldg. Contractors Assn. v. City Council, supra, 13 Cal.3d 205, 212--213, fn. 5,118 Cal.Rptr. 146, 529 P.2d 570.)

***49**481 The notice and hearing provisions of the present zoning law (Gov.Code, ss 65853--65857), like the provisions of the 1911 law before the Hurst court, make no mention of zoning by initiative. The procedures they prescribe refer only to action by the city council, and are inconsistent with the regulations that the Legislature has established to govern enactment of initiatives. For the reasons stated in our discussion of Hurst v. Burlingame, supra, we conclude that sections 65853--65857 do not apply to initiative action, and that the Livermore ordinance is not invalid for noncompliance with those sections.

3. The Livermore ordinance is not void for vagueness.

[4] The trial court found the ordinance unconstitutionally vague on two grounds: (1) that the ordinance did not contain sufficiently specific ***597** standards for the issuance or denial of building permits, and (2) that it did not specify what person or agency was empowered to determine if the ordinance's standards have been met. We disagree with both rationales and find the ordinance sufficiently specific to fulfill constitutional requirements.

The controversy concerning the specificity of the ordinance centers upon the standard as to education. The ordinance prohibits issuance of residential building permits until a 'satisfactory solution' has been evolved to the problem of 'Educational Facilities'; it defines a satisfactory solution as one characterized by 'No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code.'

The term 'double sessions' is sufficiently specific; as stated by Professor Deutsch, it 'can be defined by reference to common practice, since the term is frequently used to refer to a situation where different groups of students in the same grade are attending the same school at different times of the day because of a lack of space.' (Deutsch, Op. cit., supra, pp. 22--23.) The phrase 'overcrowded classrooms as determined by the California Education Code,' however, is less clear, since nowhere in the Education Code does there appear a definition of 'overcrowded classrooms.'

The City of Livermore, however, points out that the ordinance does not refer to a definition of 'overcrowded classrooms' contained in the Education Code, but to a Determination of that subject. The language, it contends--and plaintiff does not dispute the contention--was intended to refer to resolution 3220, adopted by the board of the Livermore Valley Joint School District on January 18, 1972, in which that board, pursuant to authority granted it by Education Code section 1052, established clear and specific standards for determining whether schools are overcrowded. [FN15]

FN15. Board Resolution 3220 provides as follows:
'ADEQUACY OF SCHOOLS
'1. Sufficient instructional space shall be determined to exist when:
a. For elementary schools:
(1) All students can be housed in single

session classes in affected schools.
(2) At least 900 square feet of functional instructional area are available for each classroom or teaching station. (3) Class sizes average 30 students or less throughout the District.
b. For secondary schools:
(1) All students can be housed within the capacity of existing schools on regular day session. Capacity will be determined by applying State Department of Education criteria in keeping with Maximum class size.
'2. Minimum support services exist when:
a. Sufficient shelf and cabinet space is provided to accommodate books and equipment normally associated with a classroom.
b. A faculty workroom exists.
c. Off-street parking for 1 1/2 cars per teaching station is provided.
d. Sufficient playground area and playground equipment is provided to support outdoor play activity.
e. Sufficient furniture and equipment for each classroom to accommodate all students and teachers.
f. A library is established equivalent to at least one classroom for each 600 students.
'3. School construction and outfitting, in terms of classroom space, architectural layout, space relationship, outdoor facilities, utilities, grounds development, and furniture and equipment, shall meet or exceed State Bureau of Education standards.'

59850**[5]****482** Rather than interpret the ordinance in a manner which would expose it to the charge of unconstitutional vagueness, we adopt the suggestion of the city and construe the ordinance's standard on education to incorporate the specific guidelines established in board resolution 3220. In so doing we conform to the rule that enactments should be interpreted when possible to uphold their validity (see San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 948, 92 Cal.Rptr. 309, 479 P.2d 669), and the corollary principle that courts should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. (See Bloom v. Municipal Court (1976) 16 Cal.3d 71, 127 Cl.Rptr. 317, 545 P.2d 229;In re Kay, supra, 1 Cal.3d 930, 83 Cal.Rptr. 686, 464 P.2d 142.)

Our decision in Braxton v. Municipal Court (1973) 10 Cal.3d 138, 109 Cal.Rptr. 897, 514 P.2d 697, illustrates the principle and provides a close analogy to the present case. In Braxton, we construed Penal Code section 626.4, which authorized a state college or university to bar from its campus anyone who had 'disrupted' the orderly operation of the campus,. Defendants argued that the term 'disrupted' was unconstitutionally vague. We determined, however, that the Legislature had intended to authorize banishment only of persons who had violated other more specific criminal statutes. Although section 626.4 did not expressly refer to such other statutes, we interpreted section 626.4 to incorporate the specific standards set out in those statutes in order to uphold the constitutionality of the section. (10 Cal.3d at p. 152, 109 Cal.Rptr. 897, 514 P.2d 697.)

Following the course suggested by Braxton, we construe the Livermore ordinance to incorporate the standards for determining the ***599** overcrowded condition of schools contained in the school board resolution of January 18, 1972. So construed, the ordinance provides a clear and ascertainable educational standard to guide the issuance or denial of a building permit, and is not void for vagueness.

[6] The ordinance's standards relating to sewage and water supply present no constitutional difficulties. The sewage provision incorporates the 'standards set by the Regional Water Quality Control Board'; that agency has in fact established specific and detailed standards of water purification and sewage disposal. [FN16] The water supply provision describes a 'satisfactory solution' as one in which water is not rationed, and 'adequate water reserves for fire protection exist.' The existence of rationing is an objective fact which can be ascertained by inquiry to the agencies having authority to ration. [FN17] Although individuals may differ as to the adequacy of reserves for fire protection, the considered judgment of the agencies responsible for fire protection would provide a reliable guide.

FN16. A statute otherwise uncertain 'will be upheld if its terms may be made reasonably certain by reference to other definable sources.' (American Civil Liberties Union v. Board of Education (1963) 59 Cal.2d 203, 218, 28 Cal.Rptr. 700, 709, 379 P.2d 4, 13.)

FN17. Professor Deutsch has suggested that absence of rationing is not a realistic measure of the adequacy of water supplies in Northern California where seasonal scarcity often requires rationing. (Deutsch, Op. cit., supra, 15 Santa Clara Law. 1, 23.) Plaintiffs in the present case, however, do not contend that the standards established in the ordinance are arbitrary or unreasonable.

Although we have determined that the ordinance's standards meet constitutional requirements of certainty, plaintiff argues, and the trial court held, that the ordinance is void because it fails to designate what agency or person determines whether these standards have been achieved. We question plaintiff's underlying assumption that an ordinance or statute is void if it does not specify on its face the agency that is to adjudge disputes concerning its application; by such a test most of the civil and criminal laws of this state would be invalidated. In any event, we believe that the Livermore ordinance, read in the light of the structure of Livermore's city government and the applicable judicial decisions, does indicate *****51**483** the method by which disagreements concerning the ordinance's standards are resolved.

[7] The Livermore ordinance establishes standards to govern the issuance or denial of residential building permits. These standards must be ***600** directed in the first instance to the city building inspector, the official charged with the duty of issuing or denying such permits. Since the duties of this official are ministerial in character, his decisions can be reviewed by writ of mandamus. (McCombs v. Larson (1959) 176 Cal.App.2d 105, 107, 1 Cal.Rptr. 140;Palmer v. Fox (1953) 118 Cal.App.2d 453, 258 P.2d 30.) Thus the ultimate decision as to compliance with the standards will be rendered by the courts. (See generally Hagman et al., Cal. Zoning Practice (Cont.Ed.Bar 1969) s 12.4.)

4. On the limited record before us, plaintiff cannot demonstrate that the Livermore ordinance is not a constitutional exercise of the city's police power.

Plaintiff urges that we affirm the trial court's injunction on a ground which it raised below, but upon which the trial court did not rely. Plaintiff contends that the ordinance proposes, and will cause, the prevention of nonresidents from migrating to Livermore, and that the ordinance therefore attempts an unconstitutional exercise of the police power, both because no compelling state interest justifies its infringement upon the migrant's constitutionally protected right to travel, and because it exceeds the police power of the municipality. [FN18]

FN18. Plaintiff does not contend that the ordinance constitutes an inverse condemnation of property (compare Associated Home Builders, etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606), that it unreasonably burdens interstate commerce (compare Construction Ind. Assn., Sonoma Cty. v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 909) or that it denies the equal protection of the laws either to landowners (compare Town of Los Altos Hills v. Adobe Creek Properties, Inc. (1973) 32 Cal.App.3d 488, 108 Cal.Rptr. 271) or to migrants (compare Ybarra v. City of Town of Los Altos Hills (9th Cir. 1974) 503 F.2d 250).

The ordinance on its face imposes no absolute prohibition or limitation upon population growth or residential construction. It does provide that no building permits will issue unless standards for educational facilities, water supply and sewage disposal have been met, but plaintiff presented no evidence to show that the ordinance's standards were unreasonable or unrelated to their apparent objectives of protecting the public health and welfare. Thus, we do not here confront the question of the constitutionality of an ordinance which limits or bars population growth either directly in express language or indirectly by the imposition of prohibitory standards; we adjudicate only the validity of ***601** an ordinance limiting building permits in accord with standards that reasonably measure the adequacy of public services.

[8][9][10] As we shall explain, the limited record here prevents us from resolving that constitutional issue. We deal here with a case in which a land use ordinance is challenged solely on the ground that it assertedly exceeds the municipality's authority under the police power; the challenger eschews any claim that the ordinance discriminates on a basis of race or wealth. Under such circumstances, we view the past

decisions of this court and the federal courts as establishing the following standard: the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare. For the guidance of the trial court we point out that if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region. We explain the process by which the court can determine whether or not such a restriction reasonably relates to the regional welfare. Since the record in the present case is limited to the pleadings and stipulations, and is devoid of evidence concerning the probable impact and duration of the ordinance's restrictions, *****52**484** we conclude that we cannot now adjudicate the constitutionality of the ordinance. Thus we cannot sustain the trial court judgment on the ground that the ordinance exceeds the city's authority under the police power; that issue can be resolved only after trial.

We turn now to consider plaintiff's arguments in greater detail. Seeking to capitalize upon the absence of an evidentiary record, plaintiff contends that the challenged ordinance must be subjected to strict judicial scrutiny; that it can be sustained only upon a showing of a compelling interest, and that the city has failed to make that showing.

Many writers have contended that exclusionary land use ordinances tend primarily to exclude racial minorities and the poor, and on that account should be subject to strict judicial scrutiny. (See e.g., Davidoff & Davidoff, Opening the Suburbs: Toward Inclusionary Land Use Controls (1971) 22 Syracuse L.Rev. 209; Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent (1969) 21 Stan.L.Rev. 767; Note, Op. cit., supra, 26 Stan.L.Rev. 585, 597, fn. 45 and authorities there cited; ***602** Note, The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge (1971) 81 Yale L.J. 61.) These writers, however, are concerned primarily with ordinances which ban or limit less expensive forms of housing while permitting expensive single family residences on large lots. The Livermore ordinance is not made from this mold; it impartially bans all residential construction, expensive or inexpensive. Consequently plaintiff at bar has eschewed reliance upon any claim that the ordinance discriminates on a basis of race or wealth.

Plaintiff's contention that the Livermore ordinance must be tested by a standard of strict scrutiny, and can be sustained only upon a showing of a compelling state interest, thus rests solely on plaintiff's assertion that the ordinance abridges a constitutionally protected right to travel. As we shall explain, however, the indirect burden imposed on the right to travel by the ordinance does not warrant application of the plaintiff's asserted standard of 'compelling interest.' [FN19]

FN19. For analysis of the constitutional origins of the right to travel, see Note, Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights? (1975) 17 Ariz.L.Rev. 145, 148--152.

In asserting that legislation which burdens a right to travel requires strict scrutiny, and can be sustained only upon proof of compelling need, plaintiff relies on recent decisions of this court (In re King (1970) 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983) and the United States Supreme Court (Memorial Hospital v. Maricopa County (1974) 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306;Dunn v. Blumstein (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274;Shapiro v. Thompson (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600). The legislation held invalid by those decisions, however, directly burdened the right to travel by distinguishing between nonresidents or newly arrived residents on the one hand and established residents on the other, and imposing penalties or disabilities on the former group. [FN20]

FN20. In re King struck down a penal code provision which declared that failure of a father to support his child was a misdemeanor when the father was a California resident, but decreed that it was a felony when the father resided out of the state. The United States Supreme Court cases overturned residency requirements imposed to restrict eligibility for medical care (Memorial Hospital v. Maricopa County), voting (Dunn v. Blumstein), or welfare (Shapiro v. Thompson). For analysis of these decisions, see generally Comment, A Strict Scrutiny of the Right to Travel (1975) 22 UCLAL Rev. 1129.)

Both the United States Supreme Court and this court have refused to apply the strict constitutional test to legislation, such as the present ***603** ordinance, which does not penalize travel and resettlement but merely makes it more difficult for the outsider to establish his residence in the place of his choosing. [FN21] (See *****53**485**Village of Belle Terre v. Boraas (1973) 416 U.S. 1, 7, 94 S.Ct. 1536, 39 L.Ed.2d 797;Ector v. City of Torrance (1973) 10 Cal.3d 129, 135, 109 Cal.Rptr. 849, 514 P.2d 433; see also McCarthy v. Philadelphia (1976) 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366;Construction Ind. Ass'n, Sonoma County v. City of Petaluma, supra, 522 F.2d 897, 906--907, fn. 13; Note, 50 N.Y.U.L.F. (1975) 1163, 1168.) The only contrary authority, the decision of the federal district court in Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma (N.D.Cal.1974) 375 F.Supp. 574 holding that an ordinance limiting residential construction must be supported by a compelling state interest has now been reversed by the Court of Appeals for the Ninth Circuit. (Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra, 522 F.2d 897, cert. den., 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342.)

FN21. For discussion of the application of the right to travel to land use regulations see Comment, The Right to Travel: Another Constitutional Standard for Local Land Use Regulations? (1972) 39 U.Chi.L.Rev. 612; Note, The Right to Travel and Exclusionary Zoning (1975) 26 Hastings L.J. 849.

Most zoning and land use ordinances affect population growth and density. (See Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra, 522 F.2d 897, 906; Note, Op. cit., supra, 26 Stan.L.Rev. 585, 606--607, fn. 91.)As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning. (See Note, Op. cit., supra, 26 Hastings L.J. 849, 854.) 'Were a court to . . . hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down; presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed.' (Comment, Zoning, Communes and Equal Protection, 1973 Urban L.Ann. 319, 324.)

[11] We conclude that the indirect burden upon the right to travel imposed by the Livermore ordinance does not call for strict judicial scrutiny. The validity of the challenged ordinance must be measured by the more ***604** liberal standards that have traditionally tested the validity of land use restrictions enacted under the municipal police power. [FN22]

FN22. In Village of Belle Terre v. Boraas, supra, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, appellants assailed an ordinance which prohibited three or more unrelated persons from living in a single household on the ground, among others, that it violated appellants' right to travel. Stating that the ordinance 'is not aimed at transients' (p. 7, 94 S.Ct. 1536), the majority rejected that contention, and applied a rational relationship test to uphold the challenged ordinance. Justice Marshall, dissenting, stated that a municipality may properly undertake to restrict uncontrolled growth and to maintain a community attractive to families. He asserted, however, that the Belle Terre ordinance in question infringed appellants' fundamental rights of association and privacy, and thus must be judged by the strict compelling interest test.
the majority and the dissenting opinion in Boraas support our conclusion that an ordinance which has the effect of limiting migration to a community does not necessarily abridge a fundamental right to travel, and thus should not be examined by the compelling interest standard unless it infringes some other fundamental right or discriminates on a suspect basis.

[12][13] This conclusion brings us to plaintiff's final contention: that the Livermore ordinance exceeds the authority conferred upon the city under the police power. The constitutional measure by which we judge the validity of a land use ordinance that is assailed as exceeding municipal authority under the

police power dates in California from the landmark decision in Miller v. Board of Public Works (1925) 195 Cal. 477, 234 P. 381. Upholding a Los Angeles ordinance which excluded commercial and apartment uses from certain residential zones, we declared that an ordinance restricting land use was valid if it had a 'real or substantial relation to the public health, safety, morals or general welfare.' (195 Cal. at p. 490, 234 P. at p. 385.) A year later the United States Supreme Court, in the landmark case of Euclid v. Ambler Co. (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, adopted the same test, holding that *****54**486** before a zoning ordinance can be held unconstitutional, 'it must be said . . . that (its) provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' (272 U.S. at p. 395, 47 S.Ct. at p. 121.) Later California decisions confirmed that a land use restriction lies within the public power if it has a 'reasonable relation to the public welfare.' (Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 461, 202 P.2d 38, 42;Hamer v. Town of Ross (1963) 59 Cal.2d 776, 783, 31 Cal.Rptr. 335, 382 P.2d 375; see Town of Los Altos Hills v. Adobe Creek Properties, Inc., supra, 32 Cal.App.3d 488, 508--509, 108 Cal.Rptr. 271 and cases there cited.)

[14] In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed ***605** to be constitutional, and come before the court with every intendment in their favor. (Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 460, 202 P.2d 38.) 'The courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment', but so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy.' (Clemons v. City of Los Angeles (1950) 36 Cal.2d 95, 98, 222 P.2d 439, 441.) In short, as stated by the Supreme Court in Euclid v. Ambler Co., supra, 'If the validity . . . be fairly debatable, the legislative judgment must be allowed to control.' (272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303.)

Recent decisions of the United States Supreme Court and the Court of Appeals for the Ninth Circuit have applied this liberal standard and, deferring to legislative judgment, have upheld ordinances attacked as exclusionary. In Village of Belle Terre v. Boraas, supra, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, the court sustained an ordinance which banned all multiple family housing. The majority opinion by Justice Douglas found a rational basis for the ordinance in the community's desire to preserve a pleasant environment; '(t)he police power,' he asserted, 'is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.' (416 U.S. at p. 9, 94 S.Ct. at p. 1541.) In dissent, Justice Marshall argued that the village's exclusion of groups of three or more unrelated persons from living in a single residence violated protected rights of privacy and association. He agreed, however, that the village could properly enact ordinances to control population density and restrict uncontrolled growth so long as it did not abridge fundamental rights, and that in reviewing such ordinances the courts should defer to the legislative judgment. (See 416 U.S. at pp. 13, 19--20, 94 S.Ct. 1536.)

In Construction Industry Ass'n, Sonoma Cty. v. City of Petaluma, supra, 522 F.2d 897, the Ninth Circuit Court of Appeals upheld a city ordinance fixing a housing development growth rate of 500 units per year. Relying largely on Belle Terre v. Boraas, supra, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, the court concluded that 'the concept of public welfare is sufficiently broad ***606** to uphold Petaluma's desire to preserve its small town character, its open space and low density of population, and to grow at an orderly and deliberate pace.' (522 F.2d at pp. 908--909.) The Supreme Court denied certiorari. (424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342.)

We conclude from these federal decisions that when an exclusionary ordinance is challenged under the federal due process clause, the standard of constitutional adjudication remains that set forth in Euclid v. Ambler Co., supra, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303: if it is fairly debatable that the ordinance is reasonably related to the public welfare, the ordinance is constitutional. A number of recent decisions from courts of other states, however, have declined to accord the traditional deference to legislative judgment in the review of exclusionary ordinances, and ruled that communities lacked authority to adopt such ordinances. Plaintiff urges that we apply *****55**487** the standards of review employed in those decisions in passing upon the instant ordinance.

The cases cited by plaintiff, however, cannot serve as a guide to resolution of the present controversy. Not only do those decisions rest, for the most part, upon principles of state law inapplicable in California, but, unlike the present case, all involve ordinances which impede the ability of low or moderate income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons. [FN23]

FN23. The most recent of these decisions, South Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel (1975) 67 N.J. 151, 336 A.2d 713, invalidated a township zoning ordinance which discriminated against low and moderate cost housing. The court based its decision upon an extensive trial record which convinced the court that deference to local legislative bodies would impede measures it found essential to the regional welfare. In National Land & Investment Co. v. Kohn (1965) 419 Pa. 504, 215 A.2d 597, the Pennsylvania Supreme Court, striking down an four-acre minimum lot requirement, independently determined that the zoning ordinance would not promote the general welfare; as we explain in text, California courts do not claim the authority to invalidate ordinances that they believe undesirable so long as it is fairly debatable that the ordinance is reasonably related to the public welfare. Appeal of Kit-Mar Builders, Inc. (1970) 439 Pa. 466, 268 A.2d 765 followed National Land in striking down a two-and-three-acre zoning law. Appeal of Girsh (1970) 437 Pa. 237, 263 A.2d 395 invoked the doctrine that a community cannot totally exclude a lawful enterprise, a doctrine rejected in California. (See Town of Los Altos Hills v. Adobe Creek Properties, Inc., supra, 32 Cal.App.3d 488, 108 Cal.Rptr. 271.) The two-acre zoning law in Board of County Sup'rs of Fairfax County v. Carper (1959) 200 Va. 653, 107 S.E.2d 390, was held invalid as an arbitrary attempt to exclude low income persons from the western two-thirds of the county. Bristow v. City of Woodhaven (1971) 35 Mich.App. 205, 192 N.W.2d 322, and other Michigan cases cited rest on a unique Michigan doctrine which presumes the unconstitutionality of ordinances restricting certain favored uses of land. The other cases cited by plaintiff (Albrecht Realty Company v. Town of New Castle (N.Y.Sup.Ct.1957) 8 Misc.2d 255, 167 N.Y.S.2d 843;Baltimore Planning Com'n v. Victor Development Co. (1971) 261 Md. 387, 275 A.2d 478;Beach v. Planning and Zoning Commission (1954) 141 Conn. 79, 103 A.2d 814) merely hold that the zoning ordinance in question exceeds the powers granted local zoning authorities under the laws of those states.

***607** We therefore reaffirm the established constitutional principle that a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare. Most previous decisions applying this test, however, have involved ordinances without substantial effect beyond the municipal boundaries. The present ordinance, in contrast, significantly affects the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative. We therefore believe it desirable for the guidance of the trial court to clearify the application of the traditional police power test to an ordinance which significantly affects nonresidents of the municipality.

When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking Whose welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

[15] These considerations impel us to the conclusion that the proper constitutional test is one which

inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region. [FN24]

FN24. In ascertaining whether a challenged ordinance reasonably relates to the regional welfare, the extent and bounds of the region significantly affected by the ordinance should be determined as a question of fact by the trial court.

***56**488 As far back as Euclid v. Ambler Co., courts recognized 'the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.' (272 U.S. 365, 390, 47 S.Ct. 114, 119, 71 L.Ed. 303.) More recently, in *608Scott v. Indian Wells (1972) 6 Cal.3d 541, 99 Cal.Rptr. 745,492 P.2d 1137, we stated that 'To hold . . . that defendant city may zone the land within its border without any concern for (nonresidents) would indeed 'make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning." (P. 548, 99 Cal.Rptr. p. 749, 492 P.2d p. 1141.) The New Jersey Supreme Court summed up the principle and explained its doctrinal basis: '(I)t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.' (So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, supra, 336 A.2d 713, 726.) [FN25]

FN25. See also Golden v. Planning Board of Town of Ramapo (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 150, 285 N.E.2d 291, 300; Walsh, Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs? (1971) 3 Conn.L.Rev. 244; Williams & Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman (1975) 29 Rutgers L.Rev. 73; Note Op. cit. supra, 26 Stan.L.Rev. 585, 606--608; Stanford Environmental Law Society, A Handbook for Controlling Local Growth (1973) page 16.

[16] We explain the process by which a trial court may determine whether a challenged restriction reasonably relates to the regional welfare. The first step in that analysis is to forecast the probable effect and duration of the restriction. In the instant case the Livermore ordinance posits a total ban on residential construction, but one which terminates as soon as public facilities reach reach specified standards. Thus to evaluate the impact of the restriction, the court must ascertain the extent to which public facilities currently fall short of the specified standards, must inquire whether the city or appropriate regional agencies have undertaken to construct needed improvements, and must determine when the improvements are likely to be completed.

The second step is to identify the competing interests affected by the restriction. We touch in this area deep social antagonisms. We allude to the conflict between the environmental protectionits and the egalitarian humanists; a collision between the forces that would save the benefits of nature and those that would preserve the opportunity of people in general to settle. Suburban residents who seek to overcome problems of inadequate schools and public facilities to secure 'the blessing of quiet seclusion and clean air' and to 'make the area a sanctuary for people' (*609Village of Belle Terre v. Boraas, supra, 416 U.S. 1, 9,94 S.Ct. 1536, 1541, 39 L.Ed.2d 797) may assert a vital interest in limiting immigration to their community. Outsiders searching for a place to live in the face of a growing shortage of adequate housing, and hoping to share in the perceived benefits of suburban life, may present a countervailing interest opposing barriers to immigration.

[17] Having identified and weighed the competing interests, the final step is to determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests. [FN26] We do not hold that a court in inquiring whether an ordinance reasonably ***57**489 relates to the regional welfare, cannot defer to the judgment of the municipality's legislative body. [FN27] But judicial deference is not judicial

abdication. The ordinance must have a Real and substantial relation to the public welfare. (Miller v. Board of Public Works, supra, 195 Cal. 477, 490, 234 P. 381.) There must be a reasonable basis in fact, not in fancy, to support the legislative determination. (Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal.2d 515, 522, 20 Cal.Rptr. 638, 370 P.2d 342.) Although in many cases it will be 'fairly debatable' (Euclid v. Ambler Co., supra, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303) that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can Never be invalidated as an enactment in excess of the police power.

FN26. For example, in upholding a city ordinance requiring a subdivider to dedicate land for park purposes, we stated in Associated Home Builders, etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 that the risk that increased development costs could exclude economically depressed persons could be 'balanced against the phenomenon of the appalling rapid disappearance of open areas in and around our cities.' (4 Cal.3d at p. 648, 94 Cal.Rptr. at p. 642, 484 P.2d at p. 618.)

FN27. The reconciliation and accommodation of the competing interests can reasonably take a variety of forms, depending upon the needs and characteristics of the community and its surrounding region. Courts have upheld restrictive zoning ordinances of limited duration (see Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (app. dismissed, 427 U.S. 901, 96 S.Ct. 3184, 49 L.Ed.2d 1195 (1976); Metro Realty v. County of El Dorado (1963) 222 Cal.App.2d 508, 35 Cal.Rptr. 480), an ordinance aimed at diverting growth to less impacted areas of a city (Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, supra), and phased growth ordinances (see Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra, 522 F.2d 897;Golden v. Planning Board of Town of Ramapo (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291.)

[18] The burden rests with the party challenging the constitutionality of an ordinance to present the evidence and documentation which the court will require in undertaking this constitutional analysis. Plaintiff in the present case has not yet attempted to shoulder that burden. ***610** Although plaintiff obtained a stipulation that as of the date of trial the ordinance's goals had not been fulfilled, it presented no evidence to show the likely duration or effect of the ordinance's restriction upon building permits. We must presume that the City of Livermore and appropriate regional agencies will attempt in good faith to provide that community with adequate schools, sewage disposal facilities, and a sufficient water supply; plaintiff, however, has not presented evidence to show whether the city and such agencies have undertaken to construct the needed improvements or when such improvements will be completed. Consequently we cannot determine the impact upon either Livermore or the surrounding region of the ordinance's restriction on the issuance of building permits pending achievement of its goals.

With respect to the competing interests, plaintiff asserts the existence of an acute housing shortage in the San Francisco Bay Area, but presents no evidence to document that shortage or to relate it to the probable effect of the Livermore ordinance. Defendants maintain that Livermore has severe problems of air pollution and inadequate public facilities which make it reasonable to divert new housing, at least temporarily, to other communities but offer no evidence to support that claim. Without an evidentiary record to demonstrate the validity and significance of the asserted interests, we cannot determine whether the instant ordinance attempts a reasonable accommodation of those interests.

In short, we cannot determine on the pleadings and stipulations alone whether this ordinance reasonably relates to the general welfare of the region it affects. The ordinance carries the presumption of constitutionality; plaintiff cannot overcome that presumption on the limited record before us. Thus the judgment rendered on this limited record cannot be sustained on the ground that the initiative ordinance falls beyond the proper scope of the police power.

5. Conclusion.

For the reasons we have explained, the Livermore ordinance is neither invalid on the ground that it was enacted by initiative nor unconstitutional by reason of vagueness. The more difficult question whether *****58**490** the measure is one which reasonably relates to the welfare of the region affected by its exclusionary impact, and thus falls within the police power of the city, cannot be decided on the limited record here. That issue can ***611** only be resolved by a trial at which evidence is presented to document the probable impact of the ordinance upon the municipality and the surrounding region.

The judgment of the superior court is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

WRIGHT, C.J., and McCOMB, SULLIVAN and RICHARDSON, JJ., concur.

CLARK, Justice (dissenting).

I dissent.

The zoning provisions of our law applicable to general law cities and the initiative provisions are clearly in conflict as recognized in Hurst v. City of Burlingame (1929) 207 Cal. 134, 277 P. 308. A long line of decisions by this court and the Courts of Appeal has followed Hurst. (E.g., Johnston v. City of Claremont (1958) 49 Cal.2d 826, 836--837, 323 P.2d 71;Simpson v. Hite (1950) 36 Cal.2d 125, 134, 222 P.2d 225;Taschner v. City Council (1973) 31 Cal.App.3d 48, 61 et seq., 107 Cal.Rptr. 214;Laguna Beach Taxpayers' Assn. v. City Council (1960) 187 Cal.App.2d 412, 415, 9 Cal.Rptr. 775; see San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 205, 215, 118 Cal.Rptr. 146, 529 P.2d 570.) Until today, it was held that because of the conflict general law cities' zoning ordinances were not subject to enactment by initiative. The rationale was: the statute conferring upon the legislative body the power to enact zoning prescribes the enactment method thereby establishing the measure of the power to enact; where a state act specifies the steps to be followed by the local body in enacting legislation, the initiative could not be used unless the steps were taken, and the steps required for zoning ordinances could not be followed within the initiative process. (Id.) The reasoning is compelling and indeed conclusive; I would not overrule Hurst and the numerous cases following it.

When we look at constitutional and statutory provisions governing zoning, related matters, and initiative process, the conflict is apparent.

ZONING

As pointed out in Hurst, a general law city is limited in the exercise of its powers by the Constitution and the general laws. (207 Cal. at p. 138, 277 P. 308;***612** see Bishop v. City of San Jose (1969) 1 Cal.3d 56, 61, 81 Cal.Rptr. 465, 460 P.2d 137.) The power of a general law city to zone is derived from article XI, section 11: 'A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations Not in conflict with general laws.' (Italics added; Miller v. Board of Public Works (1925) 195 Cal. 477, 483, 234 P. 381;People v. Johnson (1955) 129 Cal.App.2d 1, 5, 277 P.2d 45.) [FN1]

FN1. Beginning in 1879, the quoted language has appeared in our Constitution with nonmaterial changes. The only difference in language between the current section and former article XI, section 11, is that in lieu of the opening phrase 'A county or city' the former provision stated 'Any county, city, town, or township.'

The Legislature has specifically authorized general law cities and counties to adopt zoning ordinances, enumerating many of the types of zoning regulations. (Gov.Code, ss 65800, 65850.)Government Code section 65802 provides that the procedures for enactment of zoning laws are exclusive: 'No provisions of this code, other than the provisions of this chapter, and no provisions of any other code or statute shall restrict or limit the procedures provided in this chapter by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation.'

The Legislature has expressly provided that a zoning ordinance changing property from one zone to another or imposing or removing any of the numerous regulations *****59**491** set forth in Government Code section 65850 shall be adopted in the manner specified in sections 65854 to 65857 inclusive. (Gov.Code, s 65853.)

The procedure established provides for notice and hearing by the planning commission, a written report and recommendation by the planning commission including specification of the relationship of the proposed ordinance to general and specific plans, public hearings by the city council or board of supervisors after notice, and a further report by the planning commission in the event of modification by the legislative body. (Gov.Code, ss 65854-- 65857.) Interim ordinances may be adopted as urgency measures prohibiting uses in conflict with a contemplated zoning proposal but only by four-fifths vote and only for a short period of time. (Gov.Code, s 65858.) Zoning ordinances are required to be consistent with the general plan. (Gov.Code, s 65860.) Extensive provisions regulate adoption and amendment of the general plan. (***613**Gov.Code, ss 65300--65552.) There is also provision for variances. (Gov.Code, s 65906.)

Althouth the zoning power is legislative, administrative duties in addition to the ones in the above code sections have been imported into the zoning process. Legislative bodies adopting zoning ordinances are not free to merely follow the interests of their constituents but must give consideration to the interests of residents of nearby communities. (Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 546--549, 99 Cal.Rptr. 745, 492 P.2d 1137.) Recently, this court held that the California Environmental Quality Act (Pub.Resources Code, s 21050 et seq.) applied to zoning ordinances, that environmental impact reports must be prepared in cases of significant environmental impact, and that legislative bodies are required to make a written finding of no significant impact before enacting zoning ordinances if the report is not prepared. (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79 et seq., 118Cal.Rptr. 34, 529 P.2d 66.)

INITIATIVE

Article IV, section 25 of our Constitution provides: 'Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.' Proponents of an initiative in a city must give notice thereof and then circulate petitions to voters. (Elec.Code, ss 4000--4009.) If the requisite number of signatures are obtained, the ordinance is presented to the legislative body which may adopt it without change. (Elec.Code ss 4011, 4012.) If within 10 days it fails to adopt, the proposed ordinance must be submitted to the voters at a special or general election. (Id.) If the legislative body adopts the proposed ordinance without submission to the voters or if upon submission a majority of the voters approve, the proposed ordinance goes into effect, and the ordinance may not be repealed or amended except by vote of the People unless provision is otherwise made in the original ordinance. (Elec.Code, s 4015.)

CONFLICT

The zoning law and the initiative law conflict in a number of respects. Fundamentally, the zoning statutes contemplate that to achieve orderly and wise land use regulation any change in zoning ordinances is not to ***614** be made until the experts in the field have had an opportunity to evaluate the effects of the change after noticed hearing and report. Further, the zoning law contemplates that in evaluating zoning changes, the legislative body must refer modifications not covered by the initial report to the planning commission. Such reports as to the instant ordinance would show, for example, which lots are zoned solely for residential use and might indicate the potential liability, if any, of the city in inverse condemnation. [FN2] The reports would probably indicate the anticipated effect of the ordinance on surrounding communities. *****60**492** Preparation of reports might also lead to clarification; for example, it is unclear whether the ordinance is limited to permits for new residences or extends to permits for additions to and modifications of existing residences. The environmental impact report might show potential increases in automobile congestion and air pollution which might result because adoption of the ordinance may require many people to commute to work in Livermore.

FN2. The issue of inverse condemnation is not raised in argument but the issue is raised by the adoption of the ordinance. (Cf. Goldblatt v. Hempstead (1972) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130;Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322;Eldridge v. City of Palo Alto (1976) 57 Cal.App.3d 613, 618 et seq., 129 Cal.Rptr. 575.)

Because of the short time limitation in the initiative, the proposed initiative ordinance must be adopted without the notice, hearings, and reports the Legislature has required for zoning changes. The initiative law conflicts with the zoning law by permitting the voters or the city council to adopt the ordinance without compliance with the specified procedures designed to insure orderly land use planning.

There are additional conflicts and potential conflicts. There is no assurance that interests of nearby residents will be considered by the electorate, although such consideration is required. There is no procedure under the initiative law for determining compliance with the general plan as required by statute. Because the city council must either reject or accept the proposed ordinance without change, it does not have the opportunity to impose conditions and modifications in the initiative process as provided in the zoning statutes. There are potential conflicts between the initiative law's requirement that amendment be by the voters and the zoning law's provision for variances, and between the majority vote of the initiative and the zoning law's specific requirements for interim zoning.

***615** The conflict between the two statutes is clear. The zoning laws establish an administrative process which must be followed prior to the legislative act of adopting an ordinance. The initiative statutes leave no room to carry out the administrative function. Both the statutes governing zoning of general law cities and governing initiative in such cities find their authority in our Constitution. Thus, there is no basis for the majority's thesis suggesting that the Constitution requires that initiative law take precedence over the zoning law insofar as there may be conflict. Rather, the familiar rule that the specific governs the general in cases of conflict is applicable, and as held in Hurst, the zoning statutes must be given effect. The reasoning of Hurst is as applicable today as it was when the case was decided in 1929, if not more so in view of new administrative procedures governing land use planning, and I would reaffirm Hurst.

It is ironic that today's decision, reviewing a 'no growth' ordinance, may provide a loophole for developers to avoid the numerous procedures established by the Legislature which in recent years have made real estate development so difficult. Seeking approval of planned unit developments, land developers with the aid of the building trade unions should have little difficulty in securing the requisite signatures for an initiative ordinance. Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration, reports, findings, and modifications can be bypassed, and the city council may immediately adopt the planned unit development or, if the council refuses, the voters may approve. [FN3] However desirable the creation of the loophole and the elimination of socalled administrative red tape, it is not for this court, but for the Legislature to determine whether the current housing crisis warrants bypassing the zoning laws. [FN4]

FN3. The validity of Hurst was raised for the first time in this court by amici curiae. Associated Home Builders did not respond to the amici brief--the interests of Associated Home Builders' members extending beyond the borders of Livermore, they may well have preferred repudiation of Hurst to invalidation of the Livermore ordinance.

FN4. Although the majority hold that the Livermore ordinance does not conflict with Government Code sections 65853--65857, they do not deal with potential conflicts between the zoning ordinance before us and other zoning statutes, for example, whether the initiative conflicts with a general plan in violation of Government Code section 65860, whether the ordinance conflicts with section 65858 of that code limiting interim ordinances, and whether there is a conflict with the four-fifths approval requirement of that section. In regard to the latter, the ordinance was approved by approximately 55 percent of those voting, 36 percent of the registered voters. Presumably, the addition conflicts may be raised when the case is returned to the trial court.

***616** I would affirm the judgment.

*****61** MOSK, Justice (dissenting).

I dissent.

Limitations on growth may be justified in resort communities, beach and lake and mountain sites, and other rural and recreational areas; such restrictions are generally designed to preserve nature's environment for the benefit of all mankind. They fulfill our fiduciary obligation to posterity. As Thomas Jefferson wrote, the earth belongs to the living, but in usufruct. [FN1]

FN1. Jefferson called this principle 'self-evident.' (Laing, Jefferson's Usufruct Principle (July 3, 1976) 223 The Nation Magazine, p. 7.)

But there is a vast qualitative difference when a suburban community invokes an elitist concept to construct a mythical moat around its perimeter, not for the benefit of mankind but to exclude all but its fortunate current residents.

The procedural posture of the ordinance does not detain me; the majority is correct in overruling Hurst v. Burlingame (1929) 207 Cal. 134, 277 P. 308. The Hurst doctrine has long outlived its usefulness; it should no longer hobble the initiative process. Where I part company with the majority is in its substantive holding that a total exclusion of new residents can be constitutionally accomplished under a city's police power.

The majority, somewhat desultorily, deny that the ordinance imposes an absolute prohibition upon population growth or residential construction. It is true that the measure prohibits the issuance of building permits for single-family residential, multiple residential and trailer residential units until designated public services meet specified standards. But to see such restriction in practicality as something short of total prohibition is to employ ostrich vision.

First of all, the ordinance provides no timetable or dates by which the public services are to be made adequate. Thus the moratorium on permits is likely to continue for decades, or at least until attrition ultimately reduces the present population. Second, it is obvious that no inducement exists for Present residents to expend their resources to render facilities adequate for the purpose of accommodating Future ***617** residents. It would seem more rational, if improved services are really contemplated for any time in the foreseeable future, to admit the new residents and compel them to make their proportionate contribution to the cost of the educational, sewage and water services. Thus it cannot seriously be argued that Livermore maintains anything other than total exclusion.

The trial court found, inter alia, that the ordinance prohibited the issuance of building permits for residential purposes until certain conditions are met, but the measure does not provide that any person or agency is required to expend or commence any efforts on behalf of the city to meet the requirements. Nor is the city itself obliged to act within any specified time to cure its own deficiencies. Thus, in these circumstances procrastination produces its own reward: continued exclusion of new residents.

The significant omissions, when noted in relation to the ordinance preamble, reveal that the underlying purpose of the measure is 'to control residential building permits in the City of Livermore'--translation: to keep newcomers out of the city--and not to solve the purported inadequacies in municipal educational, sewage and water services. Livermore concedes no building permits are now being issued and it relates no current or prospective schedule designed to correct its defective municipal services.

A municipal policy of preventing acquisition and development of property by nonresidents clearly violates article I, sections 1 and 7, subdivisions (a) and (b), of the Constitution of California.

*****62**494** Exclusion of unwanted outsiders, while a more frequent phenomenon recently, is not entirely innovative. The State of California made an abortive effort toward exclusivity back in the 1930s as part of a scheme to stem the influx of poor migrants from the dust bowl states of the southwest. The additional burden these indigent new residents placed on California services and facilities was severely aggravated by the great depression of that period. In Edwards v. California (1941) 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119, the Supreme Court held, however, that the nature of the union established by the Constitution did not permit any one state to 'isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders.' The sanction against immigration of indigents was invalidated.

***618** If California could not protect itself from the growth problems of that era, may Livermore build a Chinese Wall to insulate itself from growth problems today? And if Livermore may do so, why not every municipality in Alameda County and in all other counties in Northern California? With a patchwork of enclaves the inevitable result will be creation of an aristocracy housed in exclusive suburbs while modest wage earners will be confined to declining neighborhoods, crowded into sterile, monotonous, multifamily projects, or assigned to pockets of marginal housing on the urban fringe. The overriding objective should be to minimize rather than exacerbate social and economic disparities, to lower barriers rather than raise them, to emphasize heterogeneity rather than homogeneity, to increase choice rather than limit it.

I am aware, of course, of the decision in Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, in which the Supreme Court, speaking through Justice Douglas, rejected challenges to an ordinance restricting land use to one-family dwellings, with a very narrow definition of 'family,' excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The village sought to assure that it would never grow much larger than 700 persons living in 220 residences. Comparable, although some growth was permitted, was the ordinance approved in Construction Ind. Assn., Sonoma Cty. v. City of Petaluma (9th Cir. 1975) 522 F.2d 897. Also similar, although allowing phased growth, was Golden v. Planning Board of Town of Ramapo (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291. [FN2]

FN2. There are other variations in traditional zoning that attempt to accommodate both orderly development and community concerns: flexible zoning, compensatory regulations, planned unit development, density zoning, contract zoning, floating zoning and time-phased zoning. Until now total prohibition of all building permits has never been included among acceptable zoning schemes.

In Belle Terre, Justice Douglas declared, 'The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. . . . A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.'

This is a comforting environmentalist declaration with which few would disagree, although the result was to allow the village of Belle ***619** Terre to remain an affluent island. Nevertheless, 'preservation of the character of the community' is a stirring slogan, at least where it is used for nothing more harmful than the exclusion of the six students who rented the large house in Belle Terre. Complications arise when ordinances are employed to exclude not merely student lodgers, but all outsiders. While the affluent may seek a congenial suburban atmosphere other than Belle Terre or Livermore, what are the alternatives for those in megalopolitan areas who cannot afford similar selectivity?

The right of all persons to acquire housing is not a mere esoteric principle; it has commanded recognition in a wide spectrum of aspects. In *****63**495**Shelley v. Kraemer (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, race restrictive covenants were declared to be constitutionally unenforceable. Chief Justice Vinson noted in his opinion that among the guarantees of the Fourteenth Amendment 'are the rights to acquire, enjoy, own and dispose of property.' In Reitman v. Mulkey (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830, the Supreme Court upheld our invalidation of a ballot proposition, declaring that "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." Justice Douglas, in a concurring opinion in Reitman, went even further to insist that 'housing is clearly marked with the public interest.' (Id. at p. 385, 87 S.Ct. at p. 1636.) Again in Jones v. Mayer Co. (1968) 392 U.S. 409, 418, 88 S.Ct. 2186, 2192, 20 L.Ed.2d 1189, a case involving racial discrimination in housing, Justice Stewart spoke of the right of all citizens "to inherit, purchase, lease, sell, hold, and convey real and personal property." (Also see Buchanan v. Warley (1917) 245U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149.)

One thing emerges with clarity from the foregoing and from numerous related cases: access to housing is regarded by the Supreme Court as a matter of serious social and constitutional concern. While this interest has generally been manifest in the context of racial discrimination, there is no valid reason for not invoking the principle when persons of all races and of all economic groups are involved. There are no invariable racial or economic characteristics of the goodly numbers of families which seek social mobility, the opportunities for the good life available in a suburban atmosphere, and access to types of housing, education and employment differing from those indigenous to crowded urban centers.

***620** There is a plethora of commentary on efforts, in a variety of contexts, of local communities to discourage the influx of outsiders. In virtually every instance, however, the cities limited availability of housing; until now it has never been seriously contemplated that a community would attempt total exclusion by refusing all building permits. (See, e.g., Williams & Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman (1975) 29 Rutgers L.Rev. 73; Note, Phased Zoning: Regulation of the Tempo and Sequence of Land Development (1974) 26 Stan.L.Rev. 585; Note, The Right to Travel and Exclusionary Zoning (1974) 26 Hastings L.J. 849; Deutsch, Land Use Growth Controls: A Case Study of San Jose and Livermore, California (1974) 15 Santa Clara Law. 1; Schroeder, Public Regulation of Private Land Use, 1973 Law & Soc. Order 747; Large, This Land is Whose Land? Changing Concepts of Land as Property (1973) Wis.L.Rev. 1039; Gaffrey, Containment Policies for Urban Sprawl, Univ. of Kan. Publications, No. 27; McClaughry, The New Feudalism (1975) 5 Environmental L. 675; Kohl, The Environmental Movement: What It Might Be (1975) 15 Nat.Res.J. 327; Note, The Right to Travel: Another Constitutional Standard for Local Land Use Regulations? (1972) 39 U.Chi.L.Rev. 612; Note, The Responsibility of Local Zoning Authorities to Nonresident Indigents (1971) 23 Stan.L.Rev. 774; Note, Exclusionary Zoning and Equal Protection (1971) 84 Harv.L.Rev. 1645; Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent (1969) 21 Stan.L.Rev. 767.)

The trend in the more perceptive jurisdictions is to prevent municipalities from selfishly donning blinders to obscure the problems of their neighbors. The Supreme Court of New Jersey has taken the lead in frowning upon creation of local exclusive enclaves and in insisting upon consideration of regional housing needs. In Oakwood at Madison, Inc. v. Township of Madison (1971) 117 N.J.Super. 11, 283 A.2d 353, 358, the court held, 'In pursuing the valid zoning purposes of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population And of the region. Housing needs are *****64**496** encompassed within the general welfare. The general welfare does not stop at each municipal boundary.' (Italics added.)

Again in the oft-cited Mt. Laurel case (So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel (1975) 67 N.J. 151, 336 A.2d 713, 724) the New Jersey Supreme Court required that municipalities afford the opportunity for housing, 'at least to the extent of the municipality's fair share of ***621** the present and Prospective regional need therefor.' (Italics added.) (Also see Schere v. Township of Freehold (1972) 119 N.J.Super. 433, 292 A.2d 35, 37.)

Pennsylvania is another state that has forthrightly spoken out against ordinances 'designed to be exclusive and exclusionary.' In National Land and Investment Company v. Kohn (1966) 419 Pa. 504, 215 A.2d 597, 612, a case remarkably similar to the instant matter, the Easttown community refused to admit new residents 'unless such admittance will not create any additional burdens upon governmental functions and services.' Justice Roberts, for the Supreme Court, replied: 'The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.'

In Appeal of Girsh (1970) 437 Pa. 237, 263 A.2d 395, the Pennsylvania Supreme Court again spoke from a broad perspective. The community involved there barred all apartment houses for the identical reasons advanced by Livermore here. Said the court with irrefutable logic: 'Appellee argues that apartment uses would cause a significant population increase with a resulting strain on available municipal services and roads, and would clash with the existing residential neighborhood. But we Explicitly rejected both these claims in National Land, supra: 'Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future--it may not be used as a means to deny the future. . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.' 419 Pa. at 527--528, 215 A.2d at 610. . . .

'. . . Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find 'a comfortable place to live' ***622** are for someone else to worry about. That decision is unacceptable. Statistics indicate that people are attempting to move away from the urban core areas, relieving the grossly overcrowded conditions that exist in most of our major cities. . . . It follows then that formerly 'outlying', somewhat rural communities, are becoming logical areas for development and population growth--in a sense suburbs to the suburbs. With improvements in regional transportation systems, these areas also are now more accessible to the central city.

'In light of this, Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels. Obviously if every municipality took that view, population spread would be completely frustrated. Municipal services must be provided Somewhere, and if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden.' (Id. at pp. 398--399; fn. omitted.)

In Girsh the Pennsylvania court added: 'Perhaps in an ideal world, planning and zoning would be done on a Regional basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intol *****65**497** erable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city.' (Id. at p. 399, fn. 4.)

Ordinances comparable to those invalidated in New Jersey and Pennsylvania have also been held invalid in Michigan (Bristow v. City of Woodhaven (1971) 35 Mich.App. 205, 192 N.W.2d 322), Maryland (Baltimore Planning Com'n v. Victor Development Co. (1971) 261 Md. 387, 275 A.2d 478) and Connecticut (Beach v. Planning & Zoning Commission (1954) 141 Conn. 79, 103 A.2d 814).

In sum, I realize the easiest course is for this court to defer to the political judgment of the townspeople of Livermore, on a they-know-what's-best-for-them theory (Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132;James v. Valtierra (1971) 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678). But conceptually, when a locality adopts a comprehensive, articulated program to prevent any population growth over the foreseeable future, it places its public ***623** policy intentions visibly on the table for judicial scrutiny and constitutional analysis.

Communities adopt growth limits from a variety of motives. There may be conservationists genuinely motivated to preserve general or specific environments. There may be others whose motivation is social exclusionism, racial exclusion, racial discrimination, income segregation, fiscal protection, or just fear of any future change; each of these purposes is well served by growth prevention.

Whatever the motivation, total exclusion of people from a community is both immoral and illegal. (Cal.Const. art. I, ss 1, 7, subds. (a) & (b).) Courts have a duty to prevent such practices, while at the same time recognizing the validity of genuine conservationist efforts.

The problem is not insoluble, nor does it necessarily provoke extreme results. Indeed, the solution can be relatively simply if municipal agencies would consider the aspirations of society as a whole, rather than merely the effect upon their narrow constituency. (See, e.g., A.L.I. Model Land Development Code, art. 7.) Accommodation between environmental preservation and satisfaction of housing needs can be reached through rational guidelines for land-use decision-making. Ours, of course, is not the legislative function. But two legal inhibitions must be the benchmark of any such guidelines. First, any absolute prohibition on housing development is presumptively invalid. And second, local regulations, based on parochialism, that limit population densities in growing suburban areas may be found invalid unless the community is absorbing a reasonable share of the region's population pressures.

Under the foregoing test, the Livermore ordinance is fatally flawed. I would affirm the judgment of the trial court.

18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41, 92 A.L.R.3d 1038, 7 Envtl. L. Rep. 20,155

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EXHIBIT 2

Avco Community Developers, Inc. v. South Coast Regional Commission
Cal.

AVCO COMMUNITY DEVELOPERS, INC., Plaintiff and Appellant,
v.
SOUTH COAST REGIONAL COMMISSION et al., Defendants and Respondents
L.A. No. 30514.

Supreme Court of California
August 25, 1976.

SUMMARY

The trial court denied a real estate developer's petition for a writ of mandate that would have required the Coastal Zone Conservation Commission to grant its claim for exemption from the permit requirements of the Coastal Zone Conservation Act (Pub. Resources Code, § 27000 et seq.). Prior to February 1, 1973, the date on which the permit requirement of Pub. Resources Code, § 27104, became effective, the developer had obtained a grading permit from the county and had secured approval of a final tract map. It had also commenced grading, had installed subdivision improvements pursuant to county approvals, and had expended over $2 million and incurred additional substantial liabilities before the effective date. At the instance of the developer, the county had zoned the project, which included the tract in question, as a "planned community development" containing a stated number of residential units. The grading had not been completed by the effective date however, and, under the county's building code, such completion was a prerequisite to obtaining a building permit. (Superior Court of Los Angeles County, No. C 68386, David N. Eagleson, Judge.)

The Supreme Court affirmed, holding that the developer had not acquired a vested right to complete development either at common law or pursuant to Pub. Resources Code, § 27404, which, at the time, allowed a builder to proceed if he had obtained a vested right to do so by having secured a building permit and in good faith diligently commenced construction and performed substantial work in reliance thereon before the effective date of the act. The court did not decide whether some type of government approval other than a building permit would constitute an exception to the rule that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. It held that such a proposed exception would not apply because none of the permits obtained by the developer related to identifiable buildings. The court further held that a claim of estoppel on the part of the commission could not be upheld on the basis of an agreement between the developer and the county, approved by the state, relating to a sale of beach property by the developer to the county at less than its fair market value. Even assuming that such agreement constituted a promise by the government that zoning laws thereafter enacted would not be applicable to the tract, the court held, the agreement would be invalid and unenforceable as contrary to the public policy precluding the government from contracting away its right to exercise the police power in the future. In conclusion, the court rejected attacks on the constitutionality of the act on its face and as applied. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Building Regulations § 3--Building Permits--Vested Rights.
If a property owner has performed substantial work and incurred substantial liabilities in good faith reli-

ance on a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit on which he relied.

(2a, 2b) Building Regulations § 6--Environmental Regulations--Coastal Zone Conservation Act--Exemptions--Vested Rights.
A real estate developer had no vested right under the common law or under the Coastal Zone Conservation Act (Pub. Resources Code, § 27000, et seq.) to proceed with a planned unit development in the coastal zone without obtaining a permit from the regional commission, where, though the developer had spent over $2 million and had incurred additional liabilities for planning, for grading under a county permit, and for installation of subdivision improvements pursuant to approvals issued by the county before February 1, 1973, the effective date of the act, it had not secured a building permit and performed substantial work thereunder as required by Pub. Resources Code, § 27404, for an exemption from the permit requirement of the act, and where the county had not been advised by the date the requirements of the act became effective as to the elementary details of the buildings to be constructed on the tract and had not given any approval for any type of structure.
[See **Cal.Jur.3d,** Building Regulations, § 1; **Am.Jur.2d,** Buildings, § 2 et seq.]
(3) Building Regulations § 3--Building Permits--Vested Rights.
Neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.

(4) Building Regulations § 6--Environmental Regulations--Coastal Zone Conservation Act--Exemptions--Estoppel.
In a mandamus proceeding by a real estate developer who sought to compel the Coastal Zone Commission to grant it an exemption from the permit requirements of the Coastal Zone Conservation Act (Pub. Resources Code, § 27000, et seq.), the trial court properly concluded that the commission was not estopped to require the obtaining of a permit by reason of an agreement, approved by the state, under which the developer had sold beach property to the county for substantially less than its fair market value conditioned on issuance by the county of certain approvals as to a tract within the coastal zone. Land use regulations, such as the act, involve the exercise of the police power and the government may not contract away its right to exercise that power in the future. Thus, if it were assumed, as claimed by the developer, that the agreement constituted a promise by the government that zoning laws thereafter enacted would not be applicable to the tract, it would be invalid and unenforceable as contrary to public policy.

COUNSEL
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MOSK, J.

We are confronted with the apparently irreconcilable conflict between the interests of a land developer who seeks to avoid compliance with a recently enacted law regulating its project, and the interests of the public in assuring development of the property in a manner consistent with the requirements of current law. Specifically, we must decide whether the developer of a subdivision may acquire a vested right to construct buildings on its land without a permit from the California Coastal Zone Commission (the commission) if it has subdivided and graded the property and made certain improvements on the land, such as installing utilities, but had not applied for or received a building permit for any structures on the land before February 1, 1973.

Section 27400 of the California Coastal Zone Conservation Act of 1972 (Pub. Resources Code, § 27000 et seq.), hereinafter called the Act, ***789** provides that on or after February 1, 1973, any person desiring to perform any development within the coastal zone (§ 27104) must obtain a permit from the commission. Section 27404, at the time relevant to the events in the present case, qualified this requirement by allowing a builder to proceed after February 1 if he had obtained a vested right to do so by having secured a building permit and in good faith diligently commenced construction and performed substantial work in reliance thereon before the effective date of the Act. [FN1]In *San Diego Coast Regional Com.* v. *See The Sea, Limited* (1973) 9 Cal.3d 888 [109 Cal.Rptr. 377, 513 P.2d 129], this court held that a builder who had obtained a building permit and performed substantial work thereunder prior to February 1, 1973, was exempt from the permit requirement of the Act.

> FN1 Section 27404 was amended in April 1973 to provide that a builder was entitled to the exemption from the permit requirement if he had obtained the permit and performed the work before November 8, 1972.

Petitioner, Avco Community Developers, Inc. (Avco) owns 7,936 acres of land in Orange County which it is developing as the Laguna Niguel Planned Community. Of this total, 836 acres, known as the Capron property, was purchased by Avco in 1968. Approximately 473 acres of the Capron property lies within the coastal zone. Our concern in this proceeding is with 74 acres of the land within the permit area, designated as tract 7479.

In 1971, the county, at the instance of Avco, zoned 5,234 acres of the Laguna Niguel project, including tract 7479, as a "Planned Community Development" containing a total of 18,925 residential units. The development was to proceed according to "Planned Community District Regulations" enacted by the county. In 1972, a final map was approved for tract 7479, dividing it into 27 parcels, devoted largely to multiple residential uses. In that year the county issued a rough grading permit which did not refer to grading for any specific building site.

Avco undertook a number of studies for the development of the tract, and proceeded to subdivide and grade the property. By February 1, 1973, pursuant to approvals issued for such purposes by the county, Avco had completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract as well as for the remainder of the Capron property. Under the county's building code, a permit could not be obtained until grading had been completed.***790** Avco had not completed the rough grading by February 1, 1973, and it neither submitted building plans for the tract nor obtained a permit to construct any structures. Before that date, the company had spent $2,082,070 and incurred liabilities of $740,468 for the development of the tract; it is losing $7,113.46 a day, largely due to loss of anticipated rental value, as a result of its inability to proceed with construction of buildings on the tract.

Avco applied to the commission for an exemption from the permit requirements of the Act, claiming that it had a vested right to complete development, and, when its application was denied, sought a writ of mandate to compel the commission to grant the exemption. FN2The trial court, after a hearing in which the evidence consisted entirely of the record of the proceedings before the commission, declined to issue the writ.

FN2 Avco initially applied to the South Coast Regional Commission for an exemption; upon denial of its application, it appealed to the statewide coastal commission, which affirmed the action of the regional commission.

The court found that the approvals granted by the county for the development of tract 7479 led Avco to reasonably expect that it would be allowed to construct buildings on the tract "without further discretionary governmental approval," and that the subdivision improvements were installed in good faith reliance upon the county's actions. The court also found that Avco had a detailed plan for the buildings to be constructed on the tract. A model of the structures intended to be built on the tract had been completed in July 1971, and the court found that the maximum number, size and type of buildings "allowable" on the tract could be ascertained by reference to the tract map, the planned community district regulations, and the model.

Although the court opined that fairness suggested Avco be allowed to complete development of the tract in accordance with the map, the regulations and the model, nevertheless because Avco did not have a building permit the trial court felt compelled to hold that it did not have a vested right to construct the buildings, and thus was not exempt from the permit requirement of the Act. The court cited *Spindler Realty Corp.* v. *Monning* (1966) 243 Cal.App.2d 255 [53 Cal.Rptr. 7], and *San Diego Coast Regional Com.* v. *See The Sea, Limited, supra*, 9 Cal.3d 888, as controlling. ***791**

Avco asserts that it had a vested right to construct buildings on tract 7479, that the commission is estopped to claim otherwise, and that the Act is unconstitutional.

Vested Rights

(1) It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 784 [194 P.2d 148].) Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied. Here Avco asserts that it had a vested right to construct buildings on tract 7479 without permission from the commission because prior to February 1, 1973, when the coastal permit requirement took effect, it spent large sums of money to construct subdivision improvements and grade the tract, in reliance on several county authorizations, and that these improvements were undertaken and approvals issued for the purpose of constructing buildings. Thus, Avco relies upon the doctrine of vested rights as defined in the common law and in the Act itself.

Vested Rights Under Common Law

(2a) Evaluation of this claim requires a determination of the point in the development process at which a landowner can be said to have acquired a vested right to construct buildings on his land. The commission contends, subject to an exception to be discussed *infra*, that a builder may not acquire a vested right prior to the issuance of a building permit, whereas Avco asserts that in the context of a subdivision a developer's right to construct buildings vests when it has subdivided the land and installed subdivision improvements such as roads and utilities pursuant to governmental authorization. Amicus curiae appearing on behalf of Avco (Oceanic California Inc. and Half Moon Bay Properties, Inc.) argue for an even earlier time of vesting in the case of a planned unit development, i.e., when such zoning is imposed on the developer's land. ***792**

In resolving this issue, we do not write on a clean slate. In *Spindler Realty Corp. v. Monning, supra*, 243 Cal.App.2d 255, a builder whose property was zoned for multiple residential use, sought and obtained a grading permit and other approvals from the City of Los Angeles to prepare a building site. The permit did not refer to the number, size and type of buildings to be erected on the site. In good faith reliance on these permits, Spindler graded the property and submitted building plans for the construction of a high rise apartment complex. It spent over $300,000 for development costs. However, before the building plans were approved, the property was rezoned for single family residential use.

Spindler contended, as does Avco here, that it had acquired a vested right to build multiple dwellings on the lot because, in good faith reliance on the existing zoning and the permits issued by the city, it had incurred substantial expenses to develop and grade the property. The court held that, while Spindler had a vested right to complete grading, it did not have a vested right to build the structures permitted by the prior zoning.

The court reasoned that Spindler knew when obtaining the grading permit that it would be required to secure a building permit in order to construct buildings, and that a grading permit is not the equivalent of a building permit even though a grading permit was required under the city's ordinances before a building permit could issue and such a permit would be granted only for building purposes. Further, opined the court, although Spindler had proceeded in good faith for two years to complete its engineering and architectural plans for the apartment house complex in reliance on multiple residential zoning and the authorizations granted by the city, Spindler was taking a calculated risk in continuing its preparations at least from the time it learned, prior to completion of grading, that the city was considering rezoning the property.

The *Spindler* decision relied heavily on *Anderson* v. *City Council* (1964) 229 Cal.App.2d 79 [40 Cal.Rptr. 41]. There, the plaintiffs contended that they had acquired a vested right to build a service station on their property in spite of a change in the zoning law made after they purchased the land, the new enactment requiring a special permit to build a structure for that purpose. They asserted that they had relied, in purchasing the property, upon the assurances of city officials that construction of a service station was permitted, and had spent sums for preliminary development costs. ***793**

The *Anderson* court held that, since all of the landowners' acts had occurred prior to the issuance of a building permit, they could not have acted in reliance upon such a permit, and therefore could not have acquired vested rights in reliance thereon. The opinion observed that the plaintiffs had not cited a single California decision in which "a property owner has been held to have acquired a vested right against future zoning without having first acquired a *building permit* to construct a specific type of building and having *thereafter* expended a considerable sum in reliance upon said permit. Such authority would appear nonexistent for the reason that the vested rights theory is predicated upon estoppel of the governing body .... Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel." (229 Cal.App.2d at p. 89.)

Faced with realization that *Spindler* and *Anderson* have not been overruled or disapproved after this court denied hearings in both cases, appellant contends they are distinguishable. Avco claims to have performed far more work on its property than the builder in *Spindler* because in addition to grading the tract it installed subdivision improvements. Moreover, there was reliance upon more governmental approvals than in *Spindler*, and upon specially enacted planned community zoning, whereas Spindler had merely depended upon existing zoning. As for *Anderson*, the landowners in that case, unlike Avco, had received no governmental approvals for improving their property.

(3) Despite minor factual variations *Spindler* and *Anderson* are clearly controlling; they stand for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.

(2b) With commendable candor, the commission concedes that it does not deem a building permit to be an absolute requirement under all circumstances for acquisition of a vested right. It suggests that in rare ***794** situations the government may grant another type of permit, such as a conditional use permit, which affords substantially the same specificity and definition to a project as a building permit, and that in such instances a builder might acquire a vested right even though the document was not designated a "building permit." We need not decide whether a governmental approval of the type referred to by the commission constitutes an exception to the rule pronounced in *Spindler* and *Anderson*, for the proposed exception would not apply here because none of the permits obtained related to identifiable buildings. Not only had Avco failed to apply to the county for permits for specific buildings by the date the requirements of the Act became effective, but the county was not advised of such elementary details as the dimension or height of the buildings to be constructed on tract 7479. The trial court's finding that "the maximum number, size and type of buildings that would be allowable to be constructed upon Tract 7479" could be ascertained by reference to the tract map, the regulations, and the model of the buildings does not support a conclusion to the contrary.

The model was prepared by Avco for its own use and was not submitted to the county. [FN3]An examination of the tract map and the regulations fails to disclose the number and size of the buildings to be constructed on the tract. The map merely designates certain areas for multiple residential use; the regulations for multiple residential structures are stated in the most general terms, and they do not refer to any identifiable buildings to be constructed on any specific lots.

> FN3 Avco submitted photographs of the model, which was prepared in 1971, to the commission. It claims that the model is a "product and synthesis" of the information supplied to the county, but there is nothing in the record to indicate that Avco had supplied the county with detailed information concerning the buildings it intended to construct on the tract.

Thus, on the date the Act became effective, the county did not know, much less had it approved, plans indicating such matters as the placement of the buildings to be built on the tract, the size of the proposed buildings, the number of apartments of specified size, or how high the buildings would rise, there being no legal height limitation for multiple residential units. Indeed, it was not even clear how many units would be built on the tract. [FN4]***795**

> FN4 Avco claims that it intended to construct 1,300 units in the tract, although 1,900 units were "authorized." It does not point to any evidence as to how it determined the number of units "authorized" for the tract. In an application for a permit to the regional commission, Avco sought to build 1,600 units.

Under these circumstances, it would be impossible to determine the precise scope of any purported right to construct buildings on the tract, and we would be compelled to deny the claim of a common law vested right even if we were to accept the theory that the *Spindler* rule is not binding in all circumstances. FN5

FN5 It is not necessary to dwell at length upon Avco's assertions that approval of the tract map and the regulations constitutes the approval of construction of buildings under the Building Code of Orange County. Avco relies on section 7-9-130(c) of the code, which prohibits construction unless a subdivision map, standards of development or a conditional use permit are approved, but the code does not authorize construction without a building permit even if such preliminary approvals are granted.

But, it is claimed, a subdivider is in a fundamentally different position than developers like those in *Spindler* and *Anderson* who build on a single tract of land, because the subdivider has obtained the approval of a subdivision map, which is asserted to be the "final discretionary approval" necessary in order to construct buildings on the land. That is, although Avco must still obtain a building permit, as well as approval of soil and geological reports, the issuance of such a permit is claimed to be merely a ministerial act since it must be issued by the county if the physical requirements of the building code are met.

The contention that Avco was entitled to a building permit because the county would have been compelled to issue it upon mere application has no merit. The Orange County Building Code (§ 302(a)) provides that a building permit may not issue unless the plans conform not only to the structural requirements of the code but to "other pertinent laws and ordinances." This provision codifies the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit. (*Brougher v. Board of Public Works* (1928) 205 Cal. 426, 435 [271 P. 487]; see *Russian Hill Improvement Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 34, 39 [56 Cal.Rptr. 672, 423 P.2d 824]; cf. *Miller v. Board of Public Works* (1925) 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479]; and see cases collected in 50 A.L.R.3d 596, 602.)A landowner which has not even applied for a permit cannot be in a better position merely because it had previously received permission to subdivide its property and made certain improvements on the land. FN6 ***796**

FN6 In *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534 [122 Cal.Rptr. 315], the court applied the "final discretionary approval" test in determining that a landowner had not acquired vested rights to develop its property. The commission had contended in the trial court and in its opening brief on appeal that a vested right could arise without a building permit if the government had approved a specific project and "all final discretionary approvals" had been obtained. The court believed itself bound to decide the case on this theory because of the position the commission had adopted below and in its opening brief on appeal.

Nor are we convinced by the importuning of amicus curiae that we should make an exception to the accepted rules set forth above because tract 7479 is part of a planned community development. Amicus suggests that a builder acquires a vested right to construct buildings at the time the government approves a planned unit development for the property. Planned unit development allows the construction of buildings on a tract free of conventional zoning so as to permit a cluster of structures, with increased density, on some portions of a tract, leaving the remainder as open space. (*Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 772 [90 Cal.Rptr. 88, 43 A.L.R.3d 880].) It is asserted that planned unit development serves the public interest because it provides an excellent means for implementing sound planning and preserving the environment, that a builder's preliminary investment in such a development far exceeds the investment required for a conventional subdivision, and that unless a landowner is assured that he can proceed with such a development in the manner initially approved by the government, he will not have the incentive to participate in a project of that type.

We have no reason to question the merits of planned unit development. However, the approval of such a plan merely imposes a special zoning on the property. It is beyond question that a landowner has no vested right in existing or anticipated zoning. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516 [125 Cal.Rptr. 365, 542 P.2d 237]; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 602 [55 Cal.Rptr. 710]; *Anderson v. City Council, supra*, 229 Cal.App.2d 79, 88-90.) We are aware of no authority compelling us to carve out an exception to this rule for planned unit zoning since the rule governs zoning of all other types. If there is to be a departure from settled rules for zoning of this character it must be provided by the Legislature.

Avco insists that the existence and scope of vested rights is a question of fact for the trial court, that we must accept the court's findings as true, FN7 ***797** and that they lead inevitably to the conclusion that it has acquired a vested right to construct buildings on tract 7479 without a permit from the commission.

FN7 The parties are in disagreement as to the scope of review of the trial court's findings. Avco contends that because conflicting inferences can be drawn from the evidence before the commission we must accept the trial court's findings as true even though the court made its determination on the basis of the record before the commission, without taking additional evidence. (Citing *Environmental Coalition of Orange County, Inc. v. AVCO Community Developers, Inc.* (1974) 40 Cal.App.3d 513, 524-525 [115 Cal.Rptr. 59].) The commission, relying on *Aries Dev. Co. v. California Coastal Zone Conservation Com., supra*, 48 Cal.App.3d 534, 545, asserts that since the only evidence before the trial court was the administrative record, which in turn consisted of documentary material, the findings of the trial court are not binding upon us. Any views expressed on this issue would be mere dictum because, as we shall conclude, Avco did not acquire a vested right even if we accept the trial court's findings.

Even if we assume arguendo that a building permit is not required in order to acquire a vested right to construct particular buildings in every case, Avco cannot prevail. As we have seen, although the trial court found that Avco had a detailed plan for the buildings to be erected on the tract, the county was not aware of and had not approved such a plan, and the preliminary approvals which it did grant did not refer to any identifiable buildings. In view of this central premise, the further findings of the trial court that Avco reasonably expected that it would be allowed to construct "buildings" on the tract "without further discretionary governmental approval" and that by granting the preliminary approvals the county represented to Avco that it would be permitted to construct "buildings ... upon obtaining building permits" are not sufficient to sustain a conclusion that Avco had secured a vested right to build structures which the county did not approve and as to which it had no detailed information.

Our conclusion that Avco has not acquired a vested right under the common law to proceed with its development absent a permit from the commission is not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices or upon a blind insistence on an instrument entitled "building permit."

If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases the inevitable consequence would be to freeze the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred. ***798**

Thus tracts or lots in tracts which had been subdivided decades ago, but upon which no buildings have been constructed could be free of all zoning laws enacted subsequent to the time of the subdivision improvement, unless facts constituting waiver, abandonment, or opportunity for amortization of the original vested right could be shown. In such situations, the result would be that these lots, as well as others in similar subdivisions created more recently or lots established in future subdivisions, would be impressed with an exemption of indeterminate duration from the requirements of any future zoning laws. To illustrate: let us hypothesize that because of mounting costs, decreasing demand or innumerable other potential causes, Avco does not build multiple residential units on tract 7479 for a number of years. If we were to accept its premise, the tract would be exempted not only from the current requirements of the Act, but from all zoning laws enacted for an indefinite period in the future. It is no response to these inherent evils to assert that this builder presently intends to construct its multiple residential units expeditiously.

Vested Rights Under the Act

Avco asserts that even if it does not have a vested right to construct buildings on the tract under common law principles, it nevertheless has such a right under the Act, as construed in *San Diego Coast Regional Com. v. See The Sea, Limited, supra*, 9 Cal.3d 888.

In *See The Sea*, a property owner *who had obtained a building permit* and commenced construction on the site prior to February 1, 1973, contended that it was exempt from the permit requirement. We held that builders who had performed substantial lawful construction on their projects before that date, pursuant to a building permit, were not required to obtain a permit from the commission. The opinion reasoned that if the Act had been intended to require a commission permit for completion of construction which had been commenced prior to February 1, it would have the effect of imposing a moratorium on all construction in the permit area, and that such a moratorium was not intended by the Act. [FN8]***799**

FN8 The opinion states, "[I]t would be unjust now to imply a permit requirement for builders who, like defendant, relied on the absence of an express requirement. Even though a particular construction project might actually conform to the act's objectives, construction would have to be interrupted while a permit is sought." (9 Cal.3d at p. 893.)

Avco's theory appears to be principally that because some portions of the opinion in *See The Sea* refer to "substantial lawful construction" of a project without referring to construction pursuant to a building permit, we were interpreting the Act to allow an exemption even though no building permit has been acquired so long as any work that had been performed was done lawfully. Clearly, however, *See The Sea* did not hold that a building permit was not required for an exemption under the Act. The case was concerned with whether construction by a builder between November 8, 1972, and February 1, 1973, pursuant to a building permit, could be considered in determining whether a vested right had been obtained, and it did not purport to decide the issue involved in the present case. Indeed, the opinion makes it clear that even the acquisition of a building permit before February 1, 1973, was not sufficient to gain an exemption, but that substantial construction under the permit was required in order to qualify for an exemption. (See also *California Central Coast etc. Conservation Com. v. McKeon Constr.* (1974) 38 Cal.App.3d 154 [112 Cal.Rptr. 903].)

Estoppel

(4) Avco asserts that even if it does not have a vested right to build without a permit from the commission, it must nevertheless be allowed to proceed with construction because the commission is estopped to enforce the requirements of the Act. This claim is founded upon the so-called "Beach Agreement" entered into between the Orange County Harbor District and Avco, and approved by the state. Under this agreement, Avco consented to sell the county 11 acres of sandy beach at a price substantially below fair market value and an additional 23 acres for parking at fair market value, and to dedicate certain land for access purposes. The district was to use the property for a public park. The sale was conditioned upon the issuance of certain approvals by the county, [FN9] the enactment of a bill by the Legislature releasing any public rights in the property, and confirmation of the agreement by the State Lands Commission. The approvals were granted, and the bill was passed.

FN9 For example, the county was required to approve planned community zoning, and to issue a grading permit.

Both the Beach Agreement and the bill recite that there is a disagreement between the county and Avco with respect to whether the public had acquired prescriptive rights in some of the land purchased by ***800** the county, and that the sale is intended to resolve these differences without litigation. Avco asserts that it agreed to sell the property to the Orange County Harbor District in exchange for a commitment by the county and the state that it would be permitted to develop tract 7479 in accordance with the planned community zoning, the regulations and the tract map, that it expended large sums of money in reliance on this promise and that the commission is estopped to apply the requirements of the Act to the development. Predictably, the commission counters this assertion by claiming that the Beach Agreement represented the resolution of a dispute over public prescriptive rights in the land conveyed and has no reference to development of any remaining property.

The trial court declined to decide whether the commission had violated the Beach Agreement because the court concluded that the state's police power overrides any obligation of the state to perform the Beach Agreement, and that the commission was not estopped to require Avco to obtain a permit under the Act.

We agree with this aspect of the trial court's conclusion. Land use regulations, such as the Act, involve the exercise of the state's police power (*Miller v. Board of Public Works, supra*, 195 Cal. 477, 486-489), and it is settled that the government may not contract away its right to exercise the police power in the future. (*Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 362 [139 P.2d 908]; *Laurel Hill Cemetery* v. *City and County* (1907) 152 Cal. 464, 475 [93 P. 70]; *Maguire* v. *Reardon* (1916) 41 Cal.App. 596, 601-602 [183 P. 303].) Thus, even upon the dubious assumption that the Beach Agreement constituted a promise by the government that zoning laws thereafter enacted would not be applicable to tract 7479, the agreement would be invalid and unenforceable as contrary to public policy.

Constitutionality of the Act on its Face and as Applied

Avco argues that the Act amounts to a taking of private property for public use without just compensation and that, because the Act was an initiative measure, it deprived Avco of property rights without notice and hearing. Our recent decisions in *State of California* v. *Superior Court (Veta)* (1974) 12 Cal.3d 237, 252-255 [***801**115 Cal.Rptr. 497, 524 P.2d 1281], and *San Diego Bldg. Contractors Assn.* v. *City Council* (1974) 13 Cal.3d 205, 210-218 [118 Cal.Rptr. 146, 529 P.2d 570], provide a complete response to this contention. FN10

FN10 It is not necessary to discuss Avco's claim that the Act fails to provide adequate standards for determining whether a permit should be granted. This proceeding does not concern the denial of a permit by the commission, but only the denial of an exemption from the permit requirement. Also see *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 325-329 [118 Cal.Rptr. 315], in which it was held that the Act did not constitute an unlawful delegation of legislative power.

Finally, Avco insists that it has been denied equal protection of the law because landowners in other counties who are in the same position would be entitled to an exemption; it does not have a building permit because the Orange County Building Code requires that grading be completed before a building permit may be issued. The laws of other governmental entities allow a grading permit and a building permit to be issued simultaneously. Thus, it is claimed, a landowner who had performed the same amount of work on his land but whose development was located in a county in which simultaneous permits are issued, would be exempt from the permit requirement of the Act, whereas Avco is subject to that requirement.

However, a builder who has obtained a building permit is not comparable to Avco since he has at least obtained approval of a specific structure which complies with the law in effect at the time the permit is issued. Moreover, it cannot be assumed that such a builder would be entitled to a vested right if he did not perform substantial work under the permit. (See *San Diego Coast Regional Com.* v. *See The Sea, Limited, supra*, 9 Cal.3d 888, 893.) FN11

FN11 Another argument of Avco based upon equal protection grounds is also without merit. The Orange County Harbor District secured an exemption from the commission to complete construction of certain facilities, such as a lifeguard station and public restrooms on the land it purchased from Avco for a park. There has been no denial of equal protection merely because the district, on the basis of different facts, was granted an exemption.

Our conclusion that no vested right inures to proceed with development of tract 7479 does not strip this land of all value. The result is merely that Avco, like all other landowners in the coastal zone who have not acquired a vested right to develop their property, must apply to the commission for a permit and, if the application is denied, then the desired buildings on the tract cannot be constructed during the period ***802** the Act is in effect. As we pointed out in *State of California* v. *Superior Court (Veta), supra*, 12 Cal.3d 237, 253, the Act is only an interim measure designed to assure that valuable coastal zone resources are not irreversibly committed during the time the commission is developing a comprehensive plan for the orderly development of the coast, and the permit requirement will automatically be repealed 91 days after adjournment of the 1976 regular session of the Legislature.

The judgment is affirmed.

Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.
Appellant's petition for a rehearing was denied September 29, 1976, and the opinion was modified to read as printed above. ***803**

Cal.
Avco Community Developers, Inc. v. South Coast Regional Com.
17 Cal.3d 785, 553 P.2d 546, 132 Cal.Rptr. 386

END OF DOCUMENT

EXHIBIT 3

Birkenfeld v. City of Berkeley
Cal.

TRUDE BIRKENFELD et al., Plaintiffs and Respondents,
v.
CITY OF BERKELEY, Defendant and Appellant; FAIR RENT COMMITTEE et al., Interveners and Appellants
S.F. No. 23370.

Supreme Court of California
June 16, 1976.

SUMMARY

A charter amendment adopted by the initiative process required a city to impose residential rent controls within the city, to be administered by a rent control board. In a class action brought by plaintiff landlords, the trial court declared the amendment void and enjoined the city from enforcing it, principally on the ground that the evidence at trial showed that the city was not faced with a serious public emergency of the sort the court deemed constitutionally prerequisite to imposition of rent controls under the police power. The trial court also determined that the charter amendment's requirement that the landlord obtain a "certificate of eviction" from the city before seeking to recover possession of a rent-control unit was invalid, in that it conflicted with state law prescribing procedures for evicting tenants. (Superior Court of Alameda County, No. 428971, Robert L. Bostick, Judge.)

The Supreme Court affirmed. The court held the existence of an emergency is no more necessary for rent control than for other forms of economic regulations which are constitutionally valid when reasonably related to the furtherance of a legitimate governmental purpose, and that the facts established at the trial did not preclude the city from legislating on the subject of residential rent control. The court also concluded that state law does not preempt the field of placing maximum limits on residential rents, and that an enactment for that purpose could properly take the form of an initiative amendment to the city charter. The court further held, however, that the charter amendment transgressed the constitutional limits of the police power by withholding powers by which the rent control board could adjust maximum rents without unreasonable delays, and instead required the board to follow an adjustment procedure which would make such delays inevitable. The court also agreed with the trial court's finding that to require a landlord to obtain a certificate of eviction before seeking to recover possession of a rent control unit invalidly conflicted with state statutes providing landlords with a summary procedure for exercising their rights of repossession against tenants. (Opinion by Wright, C. J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Municipalities § 15--Rent Control.
A city was not barred from imposing rent controls by initiative amendment to its charter merely by the absence of any state statute authorizing local legislation on that subject.

(2) Municipalities § 26--Police Power--Scope.
A city's police power under Cal. Const., art. XI, § 7, can be applied only within its own territory and is subject to displacement by general state law, but otherwise it is broad as the police power exercisable by the Legislature itself.

(3) Municipalities § 16--What are "Municipal Affairs"--Rent Controls.
Since rent control is not a municipal affair as to which a charter provision would prevail over general state law under Cal. Const., art. XI, § 5, a charter amendment adopted by the initiative process imposing rent controls could not be given effect to the ex-

tent that it conflicted with the general laws, either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation. However, the fact that the charter amendment prohibited landlords of residential units within the city from charging more than the maximum rents prescribed by a municipal rent control board under specified standards did not bring the amendment into conflict with general state law, as California has no state rent control statutes.

(4) Municipalities § 25--Police Power--Rent Control.
The California Constitution contains no "private law" exception to municipal powers, and the fact that municipal imposition of rent ceilings necessarily affects private civil relationships, and that it would nullify tenants' liabilities to landlords for rent in excess of stated ceilings, does not render a rent control measure invalid.

(5) Initiative and Referendum § 14--Local Elections--Initiative--City Charter Provisions--Rent Control.
A charter amendment adopted by the initiative process imposing residential rent controls, was not invalid on the ground it was adopted without the concurrence of the city council, and that the rent control measure interfered with the council's power to raise tax revenues by impairing the city's tax base. Such speculative consequences do not constitute a prohibited interference by the initiative power with the function of a legislative body.

(6) Initiative and Referendum § 14--Local Elections--Initiative--City Charter Provisions.
The use of the initiative process to adopt a municipal rent control measure was not invalid on the ground of the unavailability to the electorate of factfinding procedures by which a legislative body could ascertain the existence of facts that would warrant the imposition of rent controls, where the power of the electorate to amend the city charter through the initiative was derived from the Constitution, and was free from any such factfinding prerequisite.

(7) Initiative and Referendum § 14--Local Elections--Initiative--City Charter Provisions--Rent Control.
The initiative enactment of local rent control measures does not violate landlords' due process rights, on the ground that tenants are in the majority and will always vote in favor of rent control as the result of their direct economic interest in the outcome. The scope of the initiative power reserved to the people is to be liberally construed, and judicial protection of landlords' rights with respect to rent control enactments lie not in placing arbitrary restrictions on the initiative power, but in measuring the substance of the enactment's provisions against overriding constitutional and statutory requirements.

(8) Landlord and Tenant § 199--Rent Control.
A provision in a rent control measure prohibiting the eviction of a tenant who is in good standing at the expiration of the tenancy, unless the premises are to be withdrawn from the rental housing market or the landlord's offer of a renewal lease has been refused, is a reasonable means of enforcing rent ceilings by preventing landlords from putting out tenants because of their unwillingness to pay illegal amounts of rent, or their opposition to applications for increases in rent ceilings.

(9) Landlord and Tenant § 169--Unlawful Detainer--Defenses and Cross-demands--Rent Control.
The statutory remedies for a landlord's recovery of possession of the premises and of unpaid rents (Code Civ. Proc., §§ 1159-1179a; Civ. Code, § 1951 et seq.), do not preclude a defense based on municipal rent control legislation, enacted pursuant to the police power, imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings.

(10) Landlord and Tenant § 157--Remedies of Landlord--Reentry and Recovery of Possession--Effect of Rent Control Measure.
A city charter amendment imposing rent control on residential units, and requiring that landlords obtain certificates of eviction before seeking repossession

of rent-controlled units, is invalid by conflicting with Code Civ. Proc., §§ 1159-1179a, which provide landlords with a summary procedure for exercising their rights of repossession against tenants, and which fully occupy the field of landlord's possessory remedies. The summary repossession procedure is intended to be a relatively simple and speedy remedy that obviates any need for self-help by landlords, and to require landlords to fulfill elaborate prerequisites for the issuance of a certificate of eviction by a rent control board before commencing the statutory proceeding would nullify the intended summary nature of the remedy.

(11) Constitutional Law § 48--Police Power--Subjects of Regulation--Prices.
Legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose, and the existence of an emergency is not a prerequisite to such legislation. Furthermore, there is no more stringent requirement for regulation of rents than for the regulation of prices generally, as restrictions on the use of real property are among the foremost examples of proper exercises of the police power.

(12) Constitutional Law § 50--Police Power--Court Review of Exercise-- Reasonableness and Appropriateness Test.
In determining the validity of a legislative measure under the police power, a court's sole concern is whether the measure reasonably relates to a legitimate governmental purpose, which is not to be confused with the wisdom of the measure.

(13a, 13b) Municipalities § 30--Police Power--Regulation of Business and Professions--Rent Control.
The imposition of rent controls on residential property through the amendment by initiative of a city charter, was constitutional as being within a city's police power, where there was a rational basis for the legislative determination by the city's electorate that rent control was a reasonable means of counteracting harms and dangers to the public health and welfare emanating from an actual, existing housing shortage.
[See **Cal.Jur.3d,** Constitutional Law, § 69; **Am.Jur.2d,** Constitutional Law, § 143.]
(14) Constitutional Law § 48--Subjects of Regulation--Rent Control.
The constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure.

(15) Constitutional Law § 49--Police Power--Court Review of Exercise.
Although the existence of "constitutional facts" upon which the validity of a legislative enactment under the police power depends is presumed in the absence of any showing to the contrary, their nonexistence can properly be established by proof.

(16) Municipalities § 25--Police Power.
In a field of regulation not occupied by general state law, such as rent control, each city is free to exercise its police power to deal with its own local conditions, which may differ from those in other areas.

(17) Initiative and Referendum § 14--Local Elections--Initiative--City Charter Provisions- -Preamble.
Even if it could be assumed that legislation could be invalidated for mistakes in its preamble concerning facts not essential to constitutionality or legislative authority, mistakes in the preamble to an initiative measure for amendment of a city charter to impose rent controls were not grounds for invalidation, where the mistakes involved at most only descriptive differences in the degree of seriousness of the housing problems sought to be remedied, while it accurately declared the nature of the condition sought to be alleviated.

(18) Landlord and Tenant § 199--Rent Control.
Selection of August 15, 1971, as the key date for determination of base rent under a charter amend-

ment imposing rent controls, was appropriate and reasonable, where the possibility of rent controls in the city arose at least as early as March 1971, when controls were recommended in a city council report, and where on August 15, 1971, the President of the United States ordered all rents frozen, thus making the selected date the latest time at which rents had been set in an unregulated market, and the importance of the date under the federal scheme greatly increased the probability that landlords would have records concerning rents on that date readily available.

(19) Municipalities § 45--Council or Other Governing Body--Functions and Powers--Delegation of Legislative Power.
A municipal legislative body is constitutionally prohibited from delegating the formulation of legislative policy, but may declare a policy, fix a primary standard, and authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement the policy and standards, and to determine the application of the policy or standard to the facts of particular cases.

(20) Landlord and Tenant § 199--Rent Control--Standards.
Under the rule that standards sufficient for administrative application of a statute can be implied by the statutory purpose, a charter amendment imposing rent controls provided constitutionally sufficient legislative guidance to the rent control board for its determination of petitions for adjustment of maximum rents, where the stated purpose of the charter amendment was to counteract the ill effects of rapidly rising and exorbitant rents exploiting a housing shortage, and where the amendment provided a nonexclusive illustrative list of relevant factors to be considered.

(21) Landlord and Tenant § 199--Rent Control--Validity.
A city charter amendment imposing rent controls on residential property, which required a blanket rollback of all controlled rents to those in effect on August 15, 1971, or to any lower rents in effect thereafter, was constitutionally deficient and thus invalid, where it withheld powers by which the rent control board could adjust maximum rents without unreasonable delays so as to prevent the rent ceilings from being or becoming confiscatory, but instead required the board to follow a case-by-case, unit-by-unit procedure, which would make such delays inevitable, and where such adjustment procedure was not reasonably related to the amendment's stated purpose of preventing excessive rents.

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Rich & Ezer and Mitchel J. Ezer as Amici Curiae on behalf of Plaintiffs and Respondents.

WRIGHT, C. J.
In this case we consider the validity of an initiative amendment to the Charter of the City of Berkeley providing for residential rent control within that city. In a class action brought by plaintiff landlords the superior court declared the amendment void and enjoined the city from enforcing it principally on the ground that the evidence at a lengthy trial showed that the city was not faced with a serious public emergency of the sort the court deemed constitutionally prerequisite to imposition of rent controls under the police power. As hereinafter explained we have concluded that the existence of such an emergency is no more necessary for rent control than for other forms of economic regulation which are constitutionally valid when reasonably related to the furtherance of a legitimate governmental purpose, and that the facts established at the trial did not preclude the city from legislating on the subject of residential rent control. We have also

concluded that ***136** state law does not preempt the field of placing maximum limits on residential rents and that an enactment for that purpose could properly take the form of an initiative amendment to the city charter.

However, we also hold for reasons hereinafter stated that the Berkeley Charter amendment transgresses the constitutional limits of the police power not because of its objectives but because certain procedures it provides would impose heavy burdens upon landlords not reasonably related to the accomplishment of those objectives. The amendment would require a blanket rollback of all controlled rents to those in effect on August 15, 1971, (or to any lower rents in effect thereafter) and would prohibit any adjustments in maximum rents except under a unit-by-unit procedure which for reasons to be explained would be incapable of effecting necessary adjustments throughout the city within any reasonable period of time. Even if we were to adopt counsel's suggestion of a judicial postponement of the rent rollback date to one that is more current, the absence of adequate adjustment procedures would leave arbitrary maximum rents in effect far longer than would be reasonably necessary to the amendment's stated purpose of alleviating hardship caused by rising and exorbitant rents exploiting a housing shortage in the city.

In addition to controlling rents the charter amendment imposes prerequisites and restrictions upon eviction proceedings. As hereinafter explained we concur with the trial court's view that the charter amendment's requirement that the landlord obtain a "certificate of eviction" from the city before seeking to recover possession of a rent-controlled unit is invalid in that it conflicts with state law prescribing procedures for evicting tenants. In the absence of these procedural restrictions the charter amendment's prohibition against dispossession of tenants who are in good standing apart from the expiration of their terms would be a permissible means of enforcing validly imposed rent ceilings. However, such prohibition necessarily falls along with the charter amendment's constitutionally defective mechanism for adjusting maximum rents. Accordingly we affirm the judgment.

The parties before us include not only the plaintiff landlords and defendant city but also a group of organizations and individuals who filed a complaint in intervention praying that plaintiffs be denied all relief. The interveners generally represent two types of interests: (1) students, disabled persons and other low-income tenants occupying rental housing in Berkeley and (2) Berkeley residents asserting environmental ***137** interests in preserving the existing housing stock and preventing an exodus of low-income residents. The interveners participated in the trial and have filed an appeal separate from that of defendant. The record on appeal is confined to the clerk's transcript.

The regularity of the proceedings by which the charter amendment was adopted is not questioned. The amendment was proposed by initiative, [FN1] was adopted by the city electorate on June 6, 1972, and apart from questions of its substantive validity took effect on August 2, 1972, when it was ratified by the Legislature. [FN2]Its full text is printed in the chapter laws (Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372) and is set out in the appendix hereto. [FN3]

FN1 The judgment below declared the initiative procedure constitutionally insufficient for enactment of municipal rent controls in that it failed to provide landlords with reasonable notice and the right to be heard on the merits of the measure prior to its adoption. After the judgment was entered we held in *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205 [118 Cal.Rptr. 146, 529 P.2d 570] that the initiative procedure can be used to adopt a zoning ordinance constituting a general legislative (as distinct from adjudicatory) act notwithstanding the lack of notice or opportunity for hearing on the part of affected property owners. Clearly the present rent control measure is a general legislative act susceptible of adoption by initiative under our holding in *San Diego Bldg. Contractors.*(See *id.*, at pp. 214-215.)Plaintiffs do not contend otherwise on this appeal.

FN2 Approval by concurrent resolution of both houses of the Legislature was required by the then provisions of section 3 of article XI of the Constitution. In 1974 subdivision (a) of section 3 was amended to dispense with the necessity for the Legislature's approving city charter amendments.

FN3 The initiative proceedings followed the city council's refusal at a public hearing on February 8, 1972, to place the rent control issue on the ballot. In 1969 the council had appointed a rental housing committee which made studies and in March 1971 issued an exhaustive report with recommendations but decided with one dissent not to recommend rent control.

The charter amendment declares that its purpose is to alleviate the hardships caused by a "serious public emergency" endangering the public health and welfare, especially that of "the poor, minorities, students and the aged," and affecting a substantial proportion of Berkeley tenants. The emergency is declared to consist of "[a] growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock." (§ 1.) FN4 ***138**

FN4 Unless otherwise indicated, all section references hereinafter are to Article XVII of defendant's character, added by the charter amendment set out in the appendix to this opinion.

The measure provides for a rent control board (Board) of five popularly elected commissioners (§ 3) to fix and adjust maximum rents for all controlled dwelling units, administer restrictions on eviction proceedings, and exercise other regulatory and enforcement powers. Controls apply to all rented houses, apartments and rooming units other than (1) accommodations rented primarily to transient guests for periods of less than 14 days, (2) rental units in nonprofit homes for the aged or cooperatives, certain religious or medical facilities, or dormitories of an institution of higher learning, and (3) governmentally owned, operated, managed or subsidized rental housing. (§ 2, subds. (c), (h).) FN5 The Board is required to fix a "base rent" for all controlled units by "administer[ing] a rollback of rents" to the lowest level in effect on or after August 15, 1971, or to a comparable prevailing level if the unit was not rented on that date. FN6(§ 4, subd. (a).) The rolled-back base rent becomes the maximum rent subject only to "individual rent adjustments." (§ 5.)

FN5 There is no exception for new housing construction generally. The ballot argument in favor of the charter amendment (incorporated into the pleadings) stated: "Controlled rents will discourage high rent-quick profit ticky-tacky apartment construction, thus helping stop destruction of older homes and preserving Berkeley's unique environmental character. Rent control will help ensure that new housing construction serves those most in need - low income families, minorities, students and the aged."

FN6 Upon the Legislature's approval of the charter amendment no rent of a controlled unit could be raised pending "the rollback of rents to the base rent level." (§ 4, subd. (a).) The trial court adjudged this "rent freeze" to be valid up to (but not after) the date of entry of the judgment, declaring its intent that tenants be relieved of liability for rent in excess of freeze levels incurred before that date.

The Board is prohibited from granting any adjustment of the maximum rent even for an individual unit until it receives a petition from the unit's landlord or tenant and considers the petition at an adjustment hearing. (§ 6, subd. (a).) FN7 Any landlord's petition must be accompanied by a certification from the city's building inspection service showing full compliance with state and city housing codes based on an inspection made within six months. The certification is only prima facie evidence of compliance and the Board may refuse an upward rent adjustment if it finds from other competent evidence that the rental unit is not in compliance "due to the landlord's failure to provide normal and ***139** adequate housing services." (§ 5.) FN8 In considering a landlord's or tenant's petition for rent adjustment the Board must consider "relevant factors including but not limited to" (1) increases or decreases in property taxes, in operating or maintenance expenses and in rented living space or furnishings; (2) capital improvements; (3) extraordinary deterioration of the rented unit; and (4) any failure by the landlord to provide adequate housing services. (§ 5.)

FN7 The separate provisions that the Board is "empowered" to roll back rents and to set and adjust maximum rents and that it may conduct investigations and issue regulations pertinent to its duties (§ 3, subds. (f), (g)) might in themselves seem to imply broader discretion to make general adjustments of rent levels, but any such implication is clearly dispelled by the specific restrictions described in the text.

FN8 Even if the noncompliance found by the Board is promptly cured, a subsequent petition for an upward rent adjustment is subject to summary rejection on the ground that a hearing on the unit's rent level was held within the previous 12 months. (§ 6, subd. (i).)

Although the parties must be given 16 days' notice of the hearing on a rent adjustment petition (§ 6, subd. (b)), there is no expressed limit on the length of time within which the hearing may be held after the petition is filed. Hearings are open to the public and the parties may be assisted by attorneys, tenant union representatives, or any other persons they designate. (§ 6, subds. (d), (e).) The Board's official public record of the hearing, constituting "the exclusive record for decision," must include all exhibits required to be filed or in evidence, a list of participants, a summary of testimony, a statement of all materials officially noticed, findings of fact, rulings on exceptions or objections, and all recommended and final decisions and orders together with the reasons for each. (§ 6, subd. (f).) Any rent adjustment granted must be "supported by the preponderance of the evidence submitted at the hearing." (§ 6, subd. (g).) Petitions on rent-controlled units in the same building may be consolidated "with the written consent of a majority of the tenants." (§ 6, subd. (h).)

Three commissioners constitute a quorum of the Board and three affirmative votes are required for all rulings and decisions. (§ 3, subd. (i).) The Board must hold two regular meetings a month, and although there is no limit on the number of its special meetings, each commissioner's compensation of $50 per meeting is limited to $2,400 per year. (§ 3, subds. (h), (k).)

The Board is given additional responsibilities of acting upon applications for certificates of eviction submitted by landlords who desire to repossess rent-controlled units. (§ 7.) The charter amendment's provisions for this procedure and for limitations on the grounds for eviction are discussed hereinafter. ***140**

City's Power to Provide for Rent Control by Initiative Amendment to Its Charter

(1) It is contended that the defendant city was barred from imposing rent controls by the conceded absence of any state statute authorizing local legislation on the subject. As will be hereinafter discussed, the regulation of rents is proper only insofar

as it is a valid exercise of the police power. (2) The Constitution itself confers upon all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) A city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself. (*Stanislaus Co. etc. Assn. v. Stanislaus* (1937) 8 Cal.2d 378, 383-384 [65 P.2d 1305]; *In re Maas* (1933) 219 Cal. 422, 425 [27 P.2d 373].)

The decisions cited in support of the contended necessity for statutory authorization of municipal rent control measures are all from other jurisdictions and make clear that the involved cities did not have any broad grant of police power such as that enjoyed by California cities. (See *Old Colony Gardens, Inc. v. City of Stamford* (1959) 147 Conn. 60 [156 A.2d 515] (legislature's prior termination of municipal rent controls negated any implication of rent control power in city charter); *City of Miami Beach v. Fleetwood Hotel, Inc.* (Fla. 1972) 261 So.2d 801 (city charter powers strictly construed); *Ambassador East, Inc. v. City of Chicago* (1948) 399 Ill. 359, 365-367 [77 N.E.2d 803]; *Marshal House, Inc. v. Rent Review, etc. Board* (1970) 357 Mass. 709 [260 N.E.2d 200] (proscription against municipal enactment of "private or civil law governing civil relationships except as an incident to ... an independent municipal power"); *Tietjens* v. *City of St. Louis* (1949) 359 Mo. 439 [222 S.W.2d 70] ("[a] city has no inherent police power"); *Wagner v. City of Newark* (1957) 24 N.J. 467 [132 A.2d 794].) On the other hand, the decisions construing grants of municipal power comparable in breadth to the police power of California cities under article XI, section 7, of our Constitution hold that such powers encompass the imposition of local rent controls. (See *Heubeck v. City of Baltimore* (1954) 205 Md. 203 [107 A.2d 99] (grant of "Police Power to the same extent as the State has or could exercise"); *Inganamort* v. *Borough of Fort Lee* (1973) 62 N.J. 521, 534, 536 [303 A.2d 298] (grant of "greatest power of local selfgovernment consistent with the Constitution"; "'grant of broad general police powers to municipalities'"); ***141** *Warren* v. *City of Philadelphia* (1955) 382 Pa. 380, 384 [115 A.2d 218] (grant of "all powers relating to its municipal functions ... to the full extent that the General Assembly may legislate in reference thereto").)

(3) Defendant and interveners properly concede that rent control is not a municipal affair as to which a charter provision would prevail over general state law under article XI, section 5 of the Constitution. FN9(See *Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 61-63 [81 Cal.Rptr. 465, 460 P.2d 137]; *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 146-148 [82 P.2d 434, 126 A.L.R. 838].) Accordingly the charter amendment cannot be given effect to the extent that it conflicts with general laws either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation. (*Lancaster v. Municipal Court* (1972) 6 Cal.3d 805 [100 Cal.Rptr. 609, 494 P.2d 681]; *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 245-246 [90 Cal.Rptr. 8, 474 P.2d 976]; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 859 [76 Cal.Rptr. 642, 452 P.2d 930]; *In re Hubbard* (1964) 62 Cal.2d 119, 127-128 [41 Cal.Rptr. 393, 396 P.2d 809].) FN10

> FN10 Interveners suggest that the Legislature's concurrent resolution approving the charter amendment on rent control (see fn. 2 *ante*) gave the amendment the effect of a state statute. The approval was not of a statute but of an amendment to a city charter that is subject to general laws with respect to matters that are not municipal affairs. (See *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 665 [177 P.2d 558, 170 A.L.R. 225]; *City of Oakland v. Workmen's Comp. App. Bd.* (1968) 259 Cal.App.2d 163, 166 [66 Cal.Rptr. 283].) The approval was "by resolution and not

by bill" and "[did] not *ipso facto* repeal laws generally applicable throughout the state." (*Wilkes* v. *City etc. of San Francisco* (1941) 44 Cal.App.2d 393, 395 [112 P.2d 759].) Our statement in *Taylor v. Cole* (1927) 201 Cal. 327, 334 [257 P. 40], that the Legislature's ratification of the charter amendment in that case "had all the essence of a plain legislative enactment" established no more than the equivalence between ratification and enactment for the purpose of foreclosing objections to procedural irregularities in the legislative process. (See

FN9 Article XI, section 5, subdivision (a) provides: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." *id.*, at p. 333;*Santa Clara County* v. *Superior Court* (1949) 33 Cal.2d 552, 555 [203 P.2d 1].)

The fact that the charter amendment prohibits landlords of residential units within the city from charging more than the maximum rents prescribed by a municipal rent control board under specified standards does not bring the amendment into conflict with general state law. California has no state rent control statute. There is of course extensive state legislation governing many aspects of landlord-tenant relationships, ***142** some of which pertain specifically to the determination or payment of rent. (See, e.g., Civ. Code, § 827 (changing rent terms in tenancies of one month or less); Civ. Code, § 1935 (apportionment of rent); Civ. Code, § 1942 (right to deduct from rent for cost of repairs); Civ. Code, § 1942.5 (restricting retaliatory rent increases); Civ. Code, § 1947 (when rent is payable); Civ. Code, § 1950.5 (advance payments of rent).) But neither the quantity nor the content of these statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions. (See *Galvan v. Superior Court, supra*, 70 Cal.2d at pp. 860-864.) The charter amendment's purpose of preventing exploitation of a housing shortage through excessive rent charges is distinct from the purpose of any state legislation, and the imposition of rent ceilings does not materially interfere with any state legislative purpose. (See *People v. Mueller* (1970) 8 Cal.App.3d 949, 954 [88 Cal.Rptr. 157].) Whether the relevant field be deemed to be rent control as such or a broader aspect of landlord-tenant relations (see *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 27-28 [61 Cal.Rptr. 618]), there is no legislative indication of "a paramount state concern [which] will not tolerate further or additional local action." (*In re Hubbard, supra*, 62 Cal.2d at p. 128.) FN11

FN11 We here decide only that general state law does not preclude a California city from imposing some form of rent control. We need not consider whether a city is free to create the judicial remedies for violation of rent ceilings provided by sections 9, 10 and 11 of the present charter amendment in view of our conclusion, discussed hereinafter, that the amendment's provisions for *fixing* maximum rents are constitutionally deficient.

(4) It is contended that rent control is not within the municipal police power because it is "private law" purporting to regulate private civil relationships. Such an exception to municipal powers has received support from some commentators and was included in the "home rule" article of the Massachusetts Constitution in the form of a provision denying cities any inherent power "to enact private

or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." (Mass. Const., Amends., art. 89, § 7, subd. (5).) The Massachusetts Supreme Judicial Court construed this provision as preventing cities from enacting rent control measures in the absence of enabling legislation. (*Marshall House, Inc. v. Rent Review, etc. Board, supra*, 357 Mass. 709.)

The California Constitution contains no such "private law" exception to municipal powers. The fact that municipal imposition of rent ceilings necessarily affects private civil relationships by no means makes it ***143** unique among city police regulations. For example, a city ordinance specifying the liability insurance to be carried by a bus operator may give rise to a direct right of action against the insurer for injuries caused by the operator's negligence (*Milliron v. Dittman* (1919) 180 Cal. 443 [181 P. 779]), and violation of municipal building or housing codes may establish negligence in a tort action (*Finnegan* v. *Royal Realty Co.* (1950) 35 Cal.2d 409 [218 P.2d 17]), render a lease unenforceable as an illegal contract (*Howell v. City of Hamburg Co.* (1913) 165 Cal. 172, 176 [131 P. 130]), or give rise to a defense of breach of warranty of habitability in an action for rent or for recovery of possession based on nonpayment of rent (*Green v. Superior Court* (1974) 10 Cal.3d 616, 637-638 [111 Cal.Rptr. 704, 517 P.2d 1168]; *Hinson v. Delis* (1972) 26 Cal.App.3d 62 [102 Cal.Rptr. 661]). Thus, the mere fact that a city rent control measure would nullify tenants' liabilities to landlords for rent in excess of stated ceilings does not render the measure invalid. FN12

FN12 We need not consider the existence or extent of the city's power to create remedies for the violation of rent ceilings. (See fn. 11, *ante*.)

(5) It is contended that the charter amendment even if otherwise valid could not be adopted through the initiative process without the concurrence of the city council. Several arguments are advanced in support of this contention; none of them has merit.

It is argued that the charter amendment's adoption violates the principle that the initiative is ordinarily deemed inapplicable where "the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power." (*Chase v. Kalber* (1915) 28 Cal.App. 561, 569-570 [153 P. 397]; accord, *Simpson* v. *Hite* (1950) 36 Cal.2d 125, 134 [222 P.2d 225].) The governmental power that it is asserted the charter amendment would impair is the city council's power to raise tax revenues to carry on the municipal government. Past decisions invalidating initiative or referendum measures to repeal local tax levies have indicated a policy of resolving any doubts in the scope of the initiative or referendum in a manner that avoids interference with a local legislative body's responsibilities for fiscal management. (*Geiger* v. *Board of Supervisors* (1957) 48 Cal.2d 832, 839-840 [313 P.2d 545]; *Hunt v. Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426]; *Campen* v. *Greiner* (1971) 15 Cal.App.3d 836, 843 [93 Cal.Rptr. 525].)

Although the rent control measure in no way touches upon the city council's power to levy taxes, it is theorized that rent control would "cause fiscal in the long run" by impairing the city's tax base. In ***144** support of this theory our attention is drawn to published articles depicting dire consequences attributed to rent control in New York City and other communities on the eastern seaboard. Interveners cite contrary material praising the effects of rent control. Although these disputed matters would be appropriate for consideration by a legislative body or the electorate in deciding whether to adopt a rent control proposal, they cannot be relied upon for the purpose urged here. Many sorts of initiative measures arguably affect the property tax base (e.g., the initiative zoning ordinances recently upheld in *San Diego Bldg. Contractors Assn. v. City Council, supra*, 13 Cal.3d 205, and *Builders Assn. of Santa Clara-Santa Cruz Counties* v. *Superior Court* (1974) 13 Cal.3d 225 [118 Cal.Rptr. 158, 529 P.2d 582]) but such speculative consequences do not constitute a prohibited interference by the initiative power with the function of a legislative body.

Another objection raised to the use of the initiative procedure to adopt the charter amendment is that the amendment prescribes detailed procedures for carrying out its substantive provisions and thus violates a supposed rule that the initiative cannot deal with administrative (as distinct from legislative) matters. However, the decisions cited in support of this objection concern the entirely different situation of an initiative ordinance that is deemed an improper interference with the local legislative body's administrative functions assigned to it by a state statute or other controlling instrument containing the legislative policies to be administered. (See *Simpson v. Hite, supra*, 36 Cal.2d at pp. 133-135;*Housing Authority v. Superior Court* (1950) 35 Cal.2d 550, 557-559 [219 P.2d 457]; *McKevitt v. City of Sacramento* (1921) 55 Cal.App. 117, 124 [203 P. 132].) The present charter amendment interferes with no preexisting legislative policy but instead performs the purely legislative function of introducing a new regulatory scheme.

(6) It is argued that the use of the initiative process to adopt a municipal rent control measure is precluded by the unavailability to the electorate of factfinding procedures by which a legislative body can ascertain the existence of facts that would warrant the imposition of rent controls. [FN13]However, the cases relied upon for the argument deal only ***145** with factfinding procedures that are attached as conditions precedent to particular grants of legislative powers. Thus the empowering provisions of the relevant statute or charter were construed in those cases as imposing such factfinding prerequisites as ascertainment of the "prevailing wage" before fixing county salaries (*Walker* v. *County of Los Angeles* (1961) 55 Cal.2d 626 [12 Cal.Rptr. 671, 361 P.2d 247]), the holding of hearings before enactment of a zoning ordinance by a general law city (*Taschner* v. *City Council* (1973) 31 Cal.App.3d 48, 61-64 [107 Cal.Rptr. 214]), or the declaration and existence of a "great necessity or emergency" before exceeding the maximum tax rate (*San Christina etc. Co. v. San Francisco* (1914) 167 Cal. 762 [141 P. 384]) or of urgency necessitating putting an ordinance into immediate effect (*In re Hoffman* (1909) 155 Cal. 114, 119 [99 P. 517]).

> FN13 The electorate's lack of power to *compel* investigative committees or other agents to assemble information and make recommendations on particular issues does not prevent the voters from becoming well informed. Those voting on the present charter amendment had the benefit of a published report of the city council's rental housing committee and of arguments distributed with the ballots as well as the information disseminated during the campaign preceding the election.

The power of the Berkeley electorate to amend their city charter through the initiative is derived from article XI, section 3, of the Constitution and is free from any such factfinding prerequisite. Accordingly, as we said in another case with reference to an initiative city ordinance, the charter amendment "must be deemed to have been enacted on the basis of any state of facts supporting it that reasonably can be conceived." (*Higgins* v. *City of Santa Monica* (1964) 62 Cal.2d 24, 30 [41 Cal.Rptr. 9, 396 P.2d 41].) Even if the city council itself had proposed the charter amendment (Cal. Const., art. XI, § 3, subd. (b)), we could not probe the council members' motivations for doing so (*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726-727 [119 Cal.Rptr. 631, 532 P.2d 495]) and would be required to judge the amendment's validity by its own terms rather than by the motives of or influences upon the legislators (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 913 [120 Cal.Rptr. 707, 534 P.2d 403]). The subjective motivations of the voters who petitioned for and approved the amendment's adoption are similarly irrelevant to our inquiry, which is therefore unaffected by any comparison between the factfinding procedures available to the electorate and to the city council.

(7) Finally it is argued that initiative enactment of local rent control measures violates landlords' due process rights because tenants are in the majority and will always vote in favor of rent control as a result of their direct economic interest in the outcome. [FN14]The fact that the initiative ***146** process results in legislation reflecting the will of the majority and imposing certain burdens upon landlords can hardly be deemed a ground for holding the legislation invalid. It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good. (*Queenside Hills Co. v. Saxl* (1946) 328 U.S. 80, 82-83 [90 L.Ed. 1096, 1097-1098, 66 S.Ct. 850]; *Clemons v. City of Los Angeles* (1950) 36 Cal.2d 95, 102 [222 P.2d 439].) Moreover, this can be accomplished by the initiative, as in the case recently before us in which a city electorate initiated and adopted an ordinance that in effect prevented the owners of lots near the ocean from building high-rise structures that would have blocked views from larger areas located farther inland. (See

> FN14 The assumption that adoption of a city ballot measure to impose residential rent control is inevitable because tenants outnumber landlords is refuted both by the absence of rent control enactments in California communities other than Berkeley and by indications in the record that even the present measure had less than the complete support of tenants. The findings show that tenants constitute 63 percent of Berkeley's population; yet the charter amendment passed by only 52.5 percent of the vote. Moreover the declarations attached to the complaint in intervention, stating the interests of the original interveners (some of whom were later stricken as parties), show that the rent control measure received support from some *homeowners* who had such concerns as the preservation of the existing housing stock and the retention of low-income residents in the city. *San Diego Bldg. Contractors Assn. v. City Council, supra*, 13 Cal.3d 205.) We expressly recognized the propriety of using the initiative process to enact local legislation adversely affecting only a small minority of the population in *Dwyer* v. *City Council* (1927) 200 Cal. 505 [253 P. 932], where we rejected a claim that a Berkeley zoning ordinance was beyond the initiative and referendum powers because its sole effect would be to rezone a tiny fraction of the city. We said:

"It is a fundamental tenet of the American system of representative government that the legislative power of a municipality resides in the people thereof, and that the right to exercise it has been conferred by them upon their duly chosen representatives. By the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power. ... It is a characteristic of much legislation, especially in this age of intense specialization of occupations and interests, that it operates, to a greater or less degree, more directly upon one group or section of the population than upon another ...." (200 Cal. at p. 513.)

"The vice of respondents' argument consists in placing undue stress upon the sectional interest which residents of a particular district may be expected to have in restrictions more immediately affecting their district and in under-emphasizing the interest of the community as a whole in ***147** the existence of a comprehensive zoning plan. *It must be presumed that the electorate will act in the interests of the entire city*, and of the part to be affected by the proposed legislation. If the law operates more directly upon only a part of the citizens evil intent or design cannot be presumed." (Italics supplied; 200 Cal. at p. 514.) [FN15]

> FN15 Our language in *Hopping v. Council of City of Richmond* (1915) 170 Cal. 605, 617 [150 P. 977], that "[t]here may be grounds for excluding from the operation

of [the initiative and referendum] powers legislative acts which are special and local in their nature" is not authoritative since we further stated that no such question was then before us and that "we express no opinion on the subject" (170 Cal. at p. 618). The decisions in *Chase v. Kalber, supra*, 28 Cal.App. 561 and *Starbuck v. City of Fullerton* (1917) 34 Cal.App. 683 [168 P. 583], holding the initiative and referendum inapplicable to local ordinances for street improvements to be financed by the local property owners involved cities without charters and were based on a construction of state street improvement statutes. All three of these cases were distinguished in *Dwyer* (200 Cal. at pp. 517-519).

The scope of the initiative power reserved to the people is to be liberally construed. (*Farley v. Healey* (1967) 67 Cal.2d 325, 328 [62 Cal.Rptr. 26, 431 P.2d 650]; *Blotter v. Farrell* (1954) 42 Cal.2d 804, 809 [270 P.2d 481]; *Ley v. Dominguez* (1931) 212 Cal. 587, 593 [299 P. 713].) Judicial protection of landlords' rights with respect to rent control enactments such as the present charter amendment lies not in placing arbitrary restrictions upon the initiative power but in measuring the substance of the enactment's provisions against overriding constitutional and statutory requirements.

Conflict Between Charter Amendment's Eviction Provisions and General Laws

The charter amendment imposes two kinds of restraint upon eviction proceedings: It limits the grounds upon which a landlord may bring an action to repossess a rent-controlled unit (§ 7, subd. (a)) and it requires that a landlord obtain a certificate of eviction from the rent control board before seeking such repossession (§ 7, subds. (b)-(g)). These two types of restriction will be considered in order.

The permitted grounds for eviction can be grouped into three categories. One category consists of breaches of the tenant's duties to the landlord: failure to pay rent or to perform an obligation of the tenancy after notice, commission of a nuisance on or of substantial damage to the rented premises, conviction of using the premises for an illegal purpose, refusal of reasonable landlord access for repairs, inspection, or showing to a prospective purchaser, or transferring possession to an unauthorized ***148** subtenant. (§ 7, subds. (a)(1)-(4), (6)-(7).) A second category consists of the landlord's good faith intention to withdraw the unit from the rental housing market for occupancy by the landlord or specified relatives of the landlord (§ 7, subd. (a)(8)), or for demolition or conversion to nonhousing use (§ 7, subd. (a)(9)). The remaining category is the refusal of the tenant holding at the expiration of a lease ("rental housing agreement") to execute a written renewal or extension for the same duration as the original lease and on terms that are materially the same. (§ 7, subd. (a)(5).) FN16

FN16 The last-mentioned provision does not require the landlord to offer the tenant a renewal lease but simply requires the tenant to accept any such offer that is made on pain of subjection to eviction. In the absence of a renewal lease the tenant's continued possession together with the landlord's acceptance of rent after expiration of the lease term creates a periodic tenancy. (Civ. Code, § 1945; *Renner v. Huntington etc. Oil & Gas Co.* (1952) 39 Cal.2d 93, 102 [244 P.2d 985].)

These permitted grounds for eviction appear to cover most if not all of the grounds that would otherwise be available except that of termination of the tenancy. No other omitted grounds have been called to our attention and we assume for present purposes that the effect of the provision is simply to prohibit the eviction of a tenant who is in good standing at the expiration of the tenancy unless the premises are to be withdrawn from the rental housing market or the landlord's offer of a renewal lease has been refused. FN17(8) This prohibition is a reasonable means of enforcing rent ceilings by preventing landlords from putting out tenants because of their unwillingness to pay illegal amounts of rent or their opposition to applications for increases in rent ceilings. (See *Block v. Hirsh* (1921) 256 U.S. 135, 157-158 [65 L.Ed. 865, 871-872, 41 S.Ct. 458, 16 A.L.R. 165]; *Heubeck* v. *City of Baltimore, supra*, 205 Md. 203, 212.)

FN17 Nothing in the charter amendment precludes a landlord from giving notice of the termination of a tenancy at will or periodic tenancy (see Civ. Code, §§ 789, 1946) or of a lease terminable at the landlord's option. Indeed such notice is a prerequisite to an application for a certificate of eviction. (§ 7, subd. (b).) What is prohibited is using the termination of the tenancy as a basis for eviction proceedings in the absence of another permissible ground for eviction.

Plaintiffs contend that any regulation of the grounds for eviction is preempted by general state law. Code of Civil Procedure section 1161, subdivision 1, makes the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings under ***149**Code of Civil Procedure section 1164 et seq. However, these statutory provisions are not necessarily in conflict with the charter amendment's provision forbidding landlords to recover possession upon expiration of a tenancy if the purpose of the statutes is sufficiently distinct from that of the charter amendment. (See *Galvan v. Superior Court, supra*, 70 Cal.2d 851, 859;*People v. Mueller, supra*, 8 Cal.App.3d 949, 954.) The purpose of the unlawful detainer statutes is procedural. The statutes implement the landlord's property rights by permitting him to recover possession once the consensual basis for the tenant's occupancy is at an end. In contrast the charter amendment's elimination of particular grounds for eviction is a limitation upon the landlord's property rights under the police power, giving rise to a substantive ground of defense in unlawful detainer proceedings. The mere fact that a city's exercise of the police power creates such a defense does not bring it into conflict with the state's statutory scheme. Thus, a landlord's violations of a city's housing code may be the basis for the defense of breach of warranty of habitability in a summary proceeding instituted by the landlord to recover possession for nonpayment of rent. (*Green v. Superior Court, supra*, 10 Cal.3d 616, 637-638;*Hinson v. Delis, supra*, 26 Cal.App.3d 62.) (9) Similarly, the statutory remedies for recovery of possession and of unpaid rent (see Code Civ. Proc., §§ 1159-1179a; Civ. Code, § 1951 et seq.) do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings. (*Inganamort v. Borough of Fort Lee, supra*, 62 N.J. 521, 537; FN18*Warren* v. *City of Philadelphia, supra*, 382 Pa. 380, 385.) FN19***150**

FN19 A contrary result was reached in *Heubeck v. City of Baltimore, supra*, 205 Md. 203, 210, where the provision in a city rent control ordinance prohibiting eviction of tenants in good standing even after expiration of their terms was held to conflict with a state statute permitting such evictions. The court applied a rule it had laid down in earlier decisions that local ordinances invalidly conflict with state law if they "'prohibit acts permitted by statute or Constitution'"

FN18 After the *Inganamort* decision New Jersey adopted *state* legislation restricting landlords' rights to evict residential tenants upon termination of a lease or periodic tenancy. (N.J.S.A. 2A:18-61.1 et seq.; see *Gardens v. City of Passaic* (1974) 130 N.J.Super. 369 [327 A.2d 250].) This legislation was held to preempt the field to the exclusion of similar provisions in municipal rent control ordinances. (*Brunetti v. Borough of New Milford* (1975) 68 N.J. 576, 600-601 [350 A.2d 19, 32-33].) (205 Md. at p. 208). In California the question of whether a local enactment is excluded by state legislation is not necessarily concluded by the literal language of the pertinent statute but depends upon whether the state has preempted the field as indicated by the whole purpose and scope of the state legislative scheme. (*Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 682 [3 Cal.Rptr. 158, 349 P.2d 974, 82 A.L.R.2d 385]; *Pipoly v. Benson* (1942) 20 Cal.2d 366, 371-372 [125 P.2d 482, 147 A.L.R. 515].)

In addition to limiting the substantive grounds for eviction the charter amendment prescribes procedures that a landlord must undergo as a prerequisite to seeking repossession of a rent-controlled unit. Before commencing unlawful detainer proceedings (Code Civ. Proc., § 1164 et seq.) the landlord is required to obtain a certificate of eviction from the rent control board. (§ 7, subds. (b), (g).) The Board must give notice of the application for the certificate to the tenant or tenants who then have five days in which to request a full hearing conducted under the rules governing hearings for adjustments in maximum rents. (§ 7, subds. (c), (e).) The hearing must be scheduled within seven days after it is requested (§ 7, subd. (d)) and the Board must grant or deny the certificate within five days after the hearing is held (§ 7, subd. (f)). However, no limit is stated for the time within which the Board must give the tenants notice of the application after it is filed or must act on the application if no hearing is requested following such notice. Moreover, there is an express provision that either party may seek judicial review of a decision of the Board to grant or deny a certificate. (§ 7, subd. (g); § 9.)

To be granted a certificate the landlord must carry the burden of showing not only the existence of permissible grounds for eviction and that the tenancy has been properly terminated by notice but also that there are "no outstanding Code violations on the premises" other than those "substantially caused by the present tenants." (§ 7, subds. (b), (e).) Moreover, the Board is forbidden to issue a certificate if it finds that "the eviction is in retaliation for reporting Code violations or violations of this Article [the charter amendment], or for organizing other tenants, or for enforcing rights under this Charter Amendment." (§ 7, subd. (e).) A finding adverse to the landlord on the existence of code violations on the premises or on the issues of retaliation precludes issuance of the certificate regardless of the existence of any of the grounds for eviction permitted by subdivision (a) of section 7. [FN20]

FN20 In addition to these circumstances making denial of the eviction certificate mandatory, section 7, subdivision (e), through its incorporation of section 6, subdivision (i), appears to give the board discretion to reject an application for an eviction certificate summarily on the ground that issuance of the certificate was previously denied after a hearing held within the preceding 12 months, regardless of any intervening change of circumstances. (See fn. 8, *ante*.)

As already stated, the charter amendment is invalid to the extent that it purports to regulate a field that is fully occupied by general state law.***151** (*Healy v. Industrial Acc. Com.* (1953) 41 Cal.2d 118, 122 [258 P.2d 1]; fn. 10, *ante*.)(10) Plaintiffs urge and the trial court found that to require a landlord to obtain a certificate of eviction before seeking to recover possession of a rent-controlled unit invalidly conflicts with sections 1159 through 1179a of the Code of Civil Procedure, which provide landlords with a summary procedure for exercising their rights of repossession against tenants. We agree. Unlike the limitations imposed by the charter amendment upon chargeable rents and upon the grounds for eviction, which can affect summary repossession proceedings only by making substantive defenses available to the tenant, the requirement of a certificate of eviction raises procedural barriers between the landlord and the judicial proceeding. FN21Thus if a tenant were permitted to raise as a defense in a summary proceeding that the landlord had failed to obtain a certificate of eviction, the terms of the charter amendment would not permit the landlord to meet the defense by showing that he could have qualified for the certificate had he applied for it but would preclude him from relief simply because he had never gone through the proper procedures before the rent control board. FN22

FN21 Defendant's brief states: "There is nothing to prevent a landlord [from] proceeding under the unlawful detainer statutes while seeking the certificate of eviction from the Rent Control Board." To the contrary, subdivision (g) of section 7 provides: "A landlord who *seeks* to recover possession of a rent-controlled unit without *first* obtaining a certificate of eviction ... shall be in violation of this Article. ..." (Italics supplied.)

FN22 We do not reach the question of whether the defendant city could have imposed the prerequisites for a certificate of eviction as direct substantive conditions upon the right to eviction. Interveners argue that defendant could implement its policies of preventing deterioration of existing housing and of limiting chargeable rents by depriving landlords of the right to evict tenants from units not conforming to housing code standards or in retaliation for the assertion of certain tenant rights. The argument is hypothetical as the charter amendment makes these matters the tests for the rent control board's issuance of a certificate of eviction rather than imposing them as conditions upon the right of repossession enforceable by the courts.

The summary repossession procedure (Code Civ. Proc., §§ 1159-1179a) is intended to be a relatively simple and speedy remedy that obviates any need for self-help by landlords. (*Kassan v. Stout* (1973) 9 Cal.3d 39, 43-44 [106 Cal.Rptr. 783, 507 P.2d 87]; *Jordan v. Talbot* (1961) 55 Cal.2d 597, 604-605 [12 Cal.Rptr. 488, 361 P.2d 20, 6 A.L.R.3d 161]; see *Lindsey* v. *Normet* (1972) 405 U.S. 56, 71-73 [31 L.Ed.2d 36, 49-50, 92 S.Ct. 862].) To require landlords to fulfill the elaborate prerequisites for the issuance of a certificate of eviction by the rent control board before they commence the statutory proceeding would nullify the intended summary nature of the remedy. ***152**

City charter provisions purporting to impose far less burdensome prerequisites upon the exercise of statutory remedies have been held to be invalid invasions of the field fully occupied by the statute. In *Eastlick v. City of Los Angeles, supra*, 29 Cal.2d 661, damages for personal injuries resulting from a fall on a broken sidewalk were recovered from the defendant city by a plaintiff who had filed a timely claim in full compliance with the applicable state statute prior to commencing the suit. The city contended that the claim was insufficient as filed because it did not include the more detailed information prescribed by the city charter, arguing "that its charter provision as to itemization of damages is merely supplementary to the general law - an additional, not a contrary requirement - and therefore is valid." (29 Cal.2d at p. 666.) We held that the statute had occupied the field of filing such claims against municipalities and that the city could not impose more onerous conditions with respect to the required contents of a claim. We rejected the city's contention that its auditing procedures required more detailed information, pointing out that the statute was intended to provide completely for the city's needs for information about claims in advance of suit. (29 Cal.2d at p. 667.)

Similarly in *Wilson v. Beville* (1957) 47 Cal.2d 852 [306 P.2d 789], we held that an inverse condemnation suit against a city could not be conditioned upon compliance with the claim-filing requirements of the city's charter. The state statutes fully occupy the field of assessing compensation for condemned property and therefore a city charter cannot make the recovery of such compensation more onerous.

Thus we conclude that the present charter amendment's requirement that landlords obtain certificates of eviction before seeking repossession of rent-controlled units cannot stand in the face of state statutes that fully occupy the field of landlord's possessory remedies. Insofar as the charter amendment simply prohibits eviction of tenants who are in good standing except for the expiration of their tenancies, it is a reasonable means of assuring compliance with maximum rent limits and does not conflict with statutory repossession proceedings even though making available a substantive defense to eviction. However, we have concluded for reasons to be explained that the charter amendment's provisions for fixing maximum rents are constitutionally defective. Hence the limitation on the grounds for eviction cannot stand as it has no legislative purpose in the absence of limits on rent. (See *F. T. B. Realty Corp. v. Goodman* (1949) 300 N.Y. 140, 148 [89 N.E.2d 865].) Although the charter amendment contains a severability clause (§ 12), such a clause ***153** does not require that we salvage provisions which even though valid are not intended to be independently operative. (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331 [118 Cal.Rptr. 637, 530 P.2d 605].)

Regulation of Maximum Residential Rents in Berkeley as an Exercise of the Police Power

We have thus far concluded (1) that in the absence of conflicting or preemptive state law the defendant city's police power within its territorial limits is as broad as the police power exercisable by the Legislature and (2) that general state law does not preclude the defendant city from imposing maximum limits on residential rents within its territory or from restricting the grounds for evicting tenants for the purpose of enforcing those limits insofar as such control of rents and evictions is a proper exercise of the police power. We now consider whether defendant could rightfully exercise its police power in this manner under the circumstances established by the record.

Plaintiffs urge and the trial court concluded that rents cannot constitutionally be controlled in the absence of an "emergency" which the trial court defined in the language of *Levy Leasing Co.* v. *Siegel* (1922) 258 U.S. 242, 245 [66 L.Ed. 595, 602, 42 S.Ct. 289], as a condition "so grave that it constitute[s] a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State" (or in this case the city). The *Levy Leasing* decision and *Marcus Brown Co. v. Feldman* (1921) 256 U.S. 170 [65 L.Ed. 877, 41 S.Ct. 465], rejected due process objections under the Fourteenth Amendment to New York State statutes enacted in 1920 to deal with a grave housing shortage resulting from the cessation of building activities incident to World War I. The statutes provided in effect that during a period of approximately two years tenants should be immune from eviction if they paid a reasonable rent to be determined by the courts and were not "objectionable" and if the landlord did not seek to repossess the premises for personal use or demolition. Similar congressional legislation for the District of Columbia under which the rental owed by a tenant remained the same unless modified by a rent commission was upheld as against due process objections in *Block v. Hirsh, supra*, 256 U.S. 135.However, in *Chastleton Corp.* v. *Sinclair* (1924) 264 U.S. 543 [68 L.Ed. 841, 44 S.Ct. 405], the court made clear it would not tolerate extension of these rent controls beyond the period of the war emergency. Faced with a challenge to a rent reduction order of the District of Columbia Rent Commission ***154** dated August 7, 1922, and effective as of the preceding March 1st, the court remanded the case for determination of whether the emergency justifying the statute still existed on the relevant dates in view of reduced government payrolls and new building activities in the City of Washington. The court stated that the increased cost of living would not in itself justify continuing the statute in effect and added that "if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate." (264 U.S. at pp. 548-549 [68 L.Ed. at p. 844].)

These decisions concerning rent controls in Washington, D.C. and the State of New York during the aftermath of World War I are the last in which the United States Supreme Court has specifically considered the extent to which the due process clauses of the Fifth and Fourteenth Amendments allow state legislatures, or bodies exercising equivalent powers, to impose rent controls. FN23 However, an examination of the evolution of the court's views in related fields of price and wage controls will demonstrate that the "emergency" doctrine invoked to uphold rent control measures of more than half a century ago is no longer operative as it was formulated as a special exception to limitations on the police power that have long since ceased to exist.

FN23 Neither of the Supreme Court cases dealing with rent controls imposed on a nationwide basis by Congress during and immediately after World War II reached this issue. In *Bowles* v. *Willingham* (1944) 321 U.S. 503 [88 L.Ed. 892, 64 S.Ct. 641], the court considered whether Congress' conceded authority under its war powers to control rents throughout the nation during the war could be exercised in particular ways and concluded, inter alia, that the exigencies of the war eliminated any constitutional doubts that might otherwise have existed as to the propriety of (1) empowering an administrator to set rents that were fair and equitable under standards generally applicable throughout an area without considering factors peculiar to individual landlords (321 U.S. at pp. 516-519 [88 L.Ed. at pp. 904-905]) or (2) putting rent-fixing orders into effect prior to hearing objections from landlords (321 U.S. at pp. 519-521 [88 L.Ed. at pp. 905-907]). *Woods* v. *Miller Co.* (1948) 333 U.S. 138 [92 L.Ed. 596, 68 S.Ct.421], held that Congress could exercise its war powers to continue nationwide rent controls beyond the end of hostilities to cope with housing shortages caused by the demobilization of veterans and the reduction of housing construction during the war.

At the time of its rent control decisions in the early twenties a majority of the Supreme Court was of the view that the liberty protected by the due process clause included a freedom of contract which normally precluded either state legislatures or Congress legislating for the District of Columbia from regulating the amounts of prices or wages in businesses "not affected with a public interest." Legislation invalidated pursuant to this view included attempted uses of the police power to fix ***155** minimum wages for women (*Adkins v. Children's Hospital* (1923) 261 U.S. 525 [67 L.Ed. 785, 43 S.Ct. 394, 24 A.L.R. 1238]), to require compulsory arbitration of disputes over wages and hours in the food processing, clothing, fuel and transportation industries (*Wolff Co.* v. *Industrial Court* (1923) 262 U.S. 522 [67 L.Ed. 1103, 43 S.Ct. 630]), and to limit markups on resold theatre tickets (*Tyson & Brother v. Banton* (1927) 273 U.S. 418 [71 L.Ed. 718, 47 S.Ct. 426, 58 A.L.R. 1236]) and fees chargeable by employment agencies (*Ribnik* v. *McBride* (1928) 277 U.S. 350 [72 L.Ed. 913, 48 S.Ct. 545, 56 A.L.R. 1327]). In these cases the court distinguished its rent control decisions as involving "statutes ... of a temporary character, to tide over grave emergencies." (*Tyson & Brother* v. *Banton, supra*, 273 U.S. at p. 437 [71 L.Ed. at p. 725]; accord, *Wolff Co. v. Industrial Court, supra*, 262 U.S. at p. 542 [67 L.Ed. at p. 1111]; *Adkins v. Children's Hospital, supra*, 261 U.S. at pp. 551-552 [67 L.Ed. at pp. 793-794].)

But during the thirties this restrictive view of the police power was completely repudiated. Heralding the court's change of view was *Nebbia v. New York* (1934) 291 U.S. 502 [78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469], where the court declared: "[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. [¶] So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." (291 U.S. at p. 537 [78 L.Ed. at p. 957].)

Many of the prior restrictive decisions were expressly overruled. Upholding a women's minimum wage statute and overruling *Adkins v. Children's Hospital, supra*, 261 U.S. 525, the court pointed out that the Constitution does not speak of freedom of contract but only of liberty subject to due process of law, "and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." (*West Coast Hotel Co.* v. *Parrish* (1937) 300 U.S. 379, 391 [81 L.Ed. 703, 708, 57 S.Ct. 578, 108 A.L.R. 1330].) The sweeping nature ***156** of the court's change of views and its direct relationship to the earlier rent control decisions is perhaps seen most clearly in *Olsen v. Nebraska* (1941) 313 U.S. 236 [85 L.Ed. 1305, 61 S.Ct. 862, 133 A.L.R. 1500], where a unanimous court upheld a statute regulating employment agency fees and not merely overruled*Ribnik v. McBride, supra*, 277 U.S. 350, but depicted a flood of its intervening decisions as engulfing and repudiating the philosophy and approach of the *Ribnik* majority. [FN24]The repudiated legal standard was described as one by which "the constitutional validity of price-fixing legislation, *at least in absence of a so-called emergency*, was dependent on whether or not the business in question was 'affected with a public interest'." (Fn. omitted; italics added.)

> FN24 When the time came to overrule *Tyson & Brother* v. *Banton, supra*, 273 U.S. 418, and thus permit regulation of theatre ticket brokers' prices, the Supreme Court merely affirmed the judgment to that effect without opinion. (*Gold v. DiCarlo* (1965) 380 U.S. 520 [14 L.Ed.2d 266, 85 S.Ct. 1332],affirming235 F.Supp. 817.)(313 U.S. at p. 245 [85 L.Ed. at p. 1309].) The *Olsen* court thus made clear that existence of "a so-called emergency" is no longer a prerequisite to the constitutionality of legislation fixing prices regardless of whether the regulated enterprise is "affected with a public interest."

Notwithstanding this basic change in the United States Supreme Court's view of the state's power to regulate prices, the courts of several American jurisdictions have continued to treat the existence of a grave emergency as a constitutional prerequisite to any form of governmental rent control. In some instances the requirement has been held to be satisfied by a legislative declaration of emergency in the rent control statute itself and the absence from the record of any ground for treating the declaration as untrue. (*Amsterdam-Manhattan, Inc. v. City Rent & Rehab. Adm'n* (1965) 15 N.Y.2d 1014 [260 N.Y.S.2d 23, 207 N.E.2d 616]; *Lincoln Bldg. Associates v. Barr* (1956) 1 N.Y.2d 413 [153 N.Y.S.2d 633, 135 N.E.2d 801] (office space rent control); *Israel v. City Rent & Rehab. Adm'n* (S.D.N.Y. 1968) 285 F.Supp. 908; *Russell v. Treasurer & Receiver General* (1954) 331 Mass. 501, 507 [120 N.E.2d 388].) In other cases the lack of a sufficiently grave emergency has been set forth as a reason for holding rent control legislation invalid. (*Kress, Dunlap & Lane, Ltd.* v. *Downing* (3d Cir. 1960) 286 F.2d 212 (reversing summary judgment); *id.* (D. Virgin Is. 1961) 193 F.Supp. 874 (finding sufficient emergency as to low-rent housing but not as to high-rent housing or commercial property); *City of Miami Beach v. Fleetwood Hotel, supra*, 261 So.2d 861; FN25 ***157** *Warren v. City of Philadelphia* (1956) 387 Pa. 362 [127 A.2d 703].) FN26 In none of these cases does the prevailing opinion discuss the continued viability of the emergency requirement in light of the United States Supreme Court's fundamental change of approach to the constitutionality of price regulation under the due process clause. (But see dissenting opn. in

FN25 The majority opinion held that the Miami Beach City Council's determination that rent control was required by "an inflationary spiral and housing shortage" in the city failed to establish the emergency required by the World War I rent control cases (*Marcus Brown Co.* v. *Feldman, supra*, 256 U.S. 170; *Levy Leasing Co. v. Siegel, supra*, 258 U.S. 242; *Chastleton Corp.* v. *Sinclair, supra*, 264 U.S. 543). A dissenting justice thought that evidence in the record showed the existence of an emergency which met the majority's test, but the majority opinion is silent regarding such evidence. (261 So.2d at pp. 802, 804, 810.)

FN26 This decision may well rest on special rules of Pennsylvania law in view of the court's pronouncement elsewhere that "Pennsylvania ... has scrutinized regulatory egislation perhaps more closely than would the Supreme Court of the United States" (*Pennsylvania State Board of Pharmacy v. Pastor* (1971) 441 Pa. 186, 191 [272 A.2d 487, 44 A.L.R.3d 1290]).*Amsterdam-Manhattan, Inc. v. City Rent & Rehab. Adm'n, supra*, 15 N.Y.2d 1014, 1015.)

The courts that have considered the implications of this change have concluded that it renders the former emergency requirement obsolete. Thus, the Second Circuit Court of Appeals, in affirming dismissal of a landlord's action against a rent control official under the Civil Rights Act (42 U.S.C.A. § 1983 [42 U.S.C.S. § 1983]) stated that "we have no doubt that it [the United States Supreme Court] would sustain the validity of rent control today. ... The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that Nebbia v. New York, 291 U.S. 502, 539, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934), was decided. Whether, as some believe, rent control does not prolong the very condition that gave it birth, is a policy issue not appropriate for judicial concern." (*Eisen* v. *Eastman* (2d Cir. 1969) 421 F.2d 560, 567.)Similarly the New Jersey Supreme Court in sustaining the validity of municipal rent control ordinances recently observed that "rent control is, of course, but one example of the larger and more pervasive phenomenon of governmental regulation of prices under the police power. For constitutional purposes, rent control is indistinguishable from other types of governmental price regulation." (*Hutton Park Gardens v. Town Council* (1975) 68 N.J. 543 [350 A.2d 1, 7].) Accordingly the New Jersey court concluded that the United States Supreme Court's abandonment of the emergency prerequisite for price regulation generally was fully applicable to rent control legislation. (*Id.* [350 A.2d at pp. 8-10].) The same conclusion was reached by the Maryland Court of Appeals in *Westchester West No. 2 Ltd. Part v. Montgomery County* (1975) 276 Md. 448 [348 A.2d 856].***158**

Before the present case California appellate courts have not been called upon to consider the validity of a rent control measure. However, the United States Supreme Court's previously described enlargement of its view of the scope of the police power to regulate prices and its consequent repudiation of any "emergency" prerequisite for price or rent controls find their parallels in our own decisions. (11) It is now settled California law that legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 359 [55 Cal.Rptr. 23, 420 P.2d 735]; *Allied Properties v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 141, 146 [346 P.2d 737]; *Wholesale T. Dealers* v. *National etc. Co.* (1938) 11 Cal.2d 634, 643 [82 P.2d 3, 118 A.L.R. 486]) and that the existence of an emergency is not a prerequisite to such legislation (*Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 620, 637-638 [91 P.2d 577]; *Wholesale T. Dealers* v. *National etc. Co., supra,* 11 Cal.2d at pp. 654-655). FN27

> FN27 Both these decisions relied extensively on *Nebbia v. New York, supra,* 291 U.S. 502, in upholding legislation regulating prices and rejected efforts to confine the *Nebbia* principles to legislation of a temporary or emergency nature. The discussions of this point are as follows:
>
> "*Amici curiae* seek to distinguish the Nebbia case from the instant case, and particularly call our attention to the fact that the New York statute was of a temporary duration while the California act is without any limitation as to duration, but they fail to show how this difference in the two statutes does in any way divest the legislature of the power to protect an industry from a perilous condition which is permanent in character. Furthermore, the rule appears to be well established that, 'Failure by the legislature to limit the operation of the law to a definite term does not render the law invalid so long as the conditions which justify the passage of the law remain.' (*People by Van Schaick v. Title & Mortgage Guarantee Co.*, 264 N.Y. 69 [190 N.E. 153, 96 A.L.R. 297].)" (*Jersey Maid Milk Products Co. v. Brock, supra,* 13 Cal.2d at pp. 637-638.)
>
> "It is quite significant that the various cases relied upon by appellant in the instant case were cited in the dissenting opinion in the Nebbia case. The rule of the Nebbia case has been since followed. (*Bordens Farm Products Co. v. Ten Eyck,* 297 U.S. 251 [56 Sup. Ct. 453, 80 L.Ed. 669].) It is true that in these cases the United States Supreme Court emphasized the emergency nature of the legislation. The emergency referred to was in fact part of the background of the statutes. In determining judicial action, however, the character of the situation sought to be remedied rather than its abruptness is the governing factor. As we interpret the Nebbia case and the cases from this court hereafter referred to, in passing upon the validity of such statutes the sole constitutional yardstick by which they should be measured is the necessity for and the reasonableness of the regulation. The question as to whether the statute involves direct or indirect price fixing is a false quantity." (*Wholesale T. Dealers* v. *National etc. Co., supra,* 11 Cal.2d at pp. 654-655.)

Plaintiffs contend that a more pressing necessity is constitutionally required for regulation of rents than for the regulation of prices generally ***159** because of the historic preference for real property exemplified by the legal presumption that breach of an agreement to transfer real property cannot be adequately compensated by money damages (Civ. Code, § 3387; *Remmers v. Ciciliot* (1943) 59 Cal.App.2d 113, 119-120 [138 P.2d 306]). This contention is without merit. Among the foremost examples of proper exercises of the police power are restrictions on the use of real property. (See, e.g., *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515 [20 Cal.Rptr. 638, 370 P.2d 342]; *Miller v. Board of Public Works* (1925) 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479].) Plaintiffs' contention was fully answered in the earliest of the rent control cases on which they rely, where the court referred to such restrictions on the use of real property as building height limitations and succinctly observed that "if, to answer one need, the legislature may limit height, to answer another it may limit rent." (*Block v. Hirsh, supra*, 256 U.S. 135, 156 [65 L.Ed. 865, 871].) The court also stated that to restrict landlords to "a reasonable rent" "goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws." (256 U.S. at p. 157 [65 L.Ed. at p. 871].) Moreover, the virtual equivalence under modern conditions between the renting of property for residential purposes and the purchase of consumer goods and services (see *Green* v. *Superior Court, supra*, 10 Cal.3d 616, 623, 627) points to our applying the same constitutional standards to the regulation of rents that we apply to the regulation of other consumer prices.

It is suggested that the existence of a serious public emergency should be constitutionally required for rent controls because they create uncertainty about returns from capital investment in rental housing and thereby discourage construction or improvement of rental units, exacerbate any rental housing shortage, and so adversely affect the community at large. Such considerations go to the wisdom of rent controls and not to their constitutionality. (12) In determining the validity of a legislative measure under the police power our sole concern is with whether the measure reasonably relates to a legitimate governmental purpose and "[w]e must not confuse reasonableness in this context with wisdom." (*Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control, supra*, 65 Cal.2d 349, 359; accord, *Consolidated Rock Products Co. v. City of Los Angeles, supra*, 57 Cal.2d 515, 522.)

(13a) We turn then to the question of whether the imposition of any form of residential rent controls for the purposes stated in the present charter amendment is within defendant's police power in that it is reasonably related to the accomplishment of an objective for which the ***160** power can be exercised. It has long been settled that the power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life." (*Miller v. Board of Public Works, supra*, 195 Cal. 477, 485; accord, *Consolidated Rock Products Co. v. City of Los Angeles, supra*, 57 Cal.2d 515, 521-522.) The charter amendment includes in its stated purposes for imposing rent control the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups. (§ 1.) FN28 The amendment thus states on its face the existence of conditions in the city under which residential rent controls are reasonably related to promotion of the public health and welfare and are therefore within the police power.

FN28 The text of the charter amendment's section 1 is as follows:
"Statement of Purpose. A growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock constitute a serious public emergency affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing. These emergency conditions endanger the public health and welfare of the City of Berkeley and especially the health and welfare of the poor, minorities, students and the aged. The purpose of this Article, therefore, is to alleviate the hardship caused by this emergency by establishing a Rent Control Board empowered to regulate residential housing and rentals in the City of Berkeley."

(14) However, the constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure. (15)

Although the existence of "constitutional facts" upon which the validity of an enactment depends (see *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15 [112 Cal.Rptr. 786, 520 P.2d 10]) is presumed in the absence of any showing to the contrary (*In re Petersen* (1958) 51 Cal.2d 177, 182 [331 P.2d 24]; *Hart v. City of Beverly Hills* (1938) 11 Cal.2d 343, 348 [79 P.2d 1080]), their nonexistence can properly be established by proof. (*D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 727 [86 Cal.Rptr. 245]; see *U.S.* v. *Carolene Products Co.* (1938) 304 U.S. 144, 152 [82 L.Ed. 1234, 1241, 58 S.Ct. 778].)

In the present case the trial court received evidence presented by the parties from which it made findings concerning the existence of facts justifying the rent control provisions of the charter amendment and concluded that the emergency conditions that the court deemed constitutionally ***161** required for rent control did not exist. As already stated no such emergency was constitutionally required. (13b) On this state of the record our task is to review the findings (there being no reporter's transcript) and to sustain the propriety of rent controls under the police power unless the findings establish a complete absence of even a debatable rational basis for the legislative determination by the Berkeley electorate that rent control is a reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage. (*Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783 [31 Cal.Rptr. 335, 382 P.2d 375]; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462 [202 P.2d 38, 7 A.L.R.2d 990].) In reviewing the findings we also look to the trial court's memorandum opinion as an aid to their interpretation. (*Williams v. Puccinelli* (1965) 236 Cal.App.2d 512, 516 [46 Cal.Rptr. 285]; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 231, p. 4221.)

Far from dispelling any rational basis for rent control, the findings affirm the existence of housing problems that correspond in kind even if not in degree of gravity with the conditions described in section 1 of the charter amendment (see fn. 28, *ante*). A clause appearing at the outset of the findings on the "emergency" issue states that "whole segments of Berkeley's population suffer from a serious housing shortage." Additional findings indicating serious rental housing problems in Berkeley when the charter amendment was adopted include the following:

1. The City of Berkeley "offers a distinctive and attractive life style, and a superior school system which, because integrated, is desirable to minorities and to young people generally, ... is the site of the original campus of the University of California and has an established reputation as a university city ... [, and] is primarily residential in character with some industrial areas."

2. The vacancy rate for residential housing was "in excess of 3%" and "such a vacancy rate is low." According to the court's memorandum opinion, the vacancy rate for *apartment* rental housing was 3.1 percent and "[b]y any standard the rate is low."

3. "The population of [Berkeley] ... was approximately 116,000 of which approximately 63% were tenants. Of the total population, approximately 30,000 persons comprise a group which spends in excess of 35% of its income for housing .... Of said 30,000 persons, about 25,000 were in the group earning under $5,000 per year, and such group consisted ***162** largely of students, low income (aged, minorities, and disabled) and 'other young people' in about equal numbers. ... It is evident that the housing conditions of low-income persons in Berkeley are serious ...."

4. In 1970 Berkeley had a black population of approximately 23.5 percent. These residents have received housing aid from "federally-funded assistance programs" but such programs "have, for the most part, ceased." "Many of the families of South Berkeley and West Berkeley [predominantly black] had low incomes or were receiving public assistance."

5. "[S]ome of the aged and disabled persons in Berkeley suffer adverse conditions in their capability of finding reasonably priced low-cost housing, ... and it is recognized that aid programs are inadequate for their needs. ... [T]he housing conditions for such groups in Berkeley were and are serious."

6. The group designated "other young people" "for the main part, consist of non-students who choose to live in Berkeley because they are attracted to its life style. Many of them have marginal incomes and the condition of their housing is generally comparable to that of the low-income group."

Offsetting these findings of serious housing problems are other findings of ameliorative conditions which would provide appropriate material for arguing to a legislative body that it should not enact rent controls but which do not dispel the constitutionally sufficient rational basis for residential rent control provided by the charter amendment's statement of purpose (§ 1; fn. 28, *ante*) and the findings previously summarized. The findings of ameliorative conditions are of three kinds.

First are findings of improvement in housing conditions which state as follows: Between 1960 and 1970 new rental housing increased faster than population and the vacancy rate rose from 2.6 percent in 1971 to 3.1 percent in 1972. At the time of trial further vacancies were expected to result from the carrying out of the plans of certain employers to move out of Berkeley or to reduce personnel. Dormitory space was available for almost all university students needing it and according to a university official adequate financial aid was available for students who established that their parents could not support them. The percentage of rental housing available for less than $200 per month in certain districts of Berkeley in 1970 ranged between 85 and 98 percent. Nonwhite home ***163** ownership increased markedly between 1960 and 1970. While all these facts are encouraging they do not push beyond the pale of rational debate the existence of a housing shortage and accompanying excessive rents serious enough to warrant the imposition of rent controls.

The second category of ameliorative findings consists in comparisons between housing conditions in Berkeley and in adjoining areas. It is found that Berkeley is "part of one continuous urban area geographically indistinguishable from Richmond on the north through Oakland on the south" and that the rental housing vacancy rate in both Richmond and Oakland was 6 percent as compared to 3.1 percent in Berkeley. With respect to the low-income group designated as "other young people" it is found that "their mobility is such as to make it possible for them to live in surrounding, relatively high vacancy areas." On the other hand the finding stating the adverse housing problems faced by the aged and disabled group in Berkeley adds that "their condition is not unlike that experienced in other metropolitan areas."

Neither the availability to some low-income residents of housing in adjoining cities nor the fact that the problems of the aged and disabled in Berkeley are no worse than in other metropolitan areas detracts from Berkeley's power to safeguard and promote the health and welfare of persons who choose to live in that city. (16) In a field of regulation not occupied by general state law such as rent control each city is free to exercise its police power to deal with its own local conditions which may differ from those in other areas. (See *Galvan v. Superior Court, supra*, 70 Cal.2d 851, 863-864.) Among Berkeley's local conditions, according to a previously quoted finding, are a distinctive lifestyle, school system, and reputation as a university city all of which attract residents and offer a likely explanation for a rental housing vacancy rate that is markedly lower than in adjoining cities. Berkeley is not constitutionally required to ignore any of its housing problems on the ground that they would not exist if some of its residents were to live elsewhere.

Finally the findings indicating the existence of serious housing problems are offset by statements in the findings that such problems "are not so wide-spread as to constitute an emergency" and that "no such emergency as referred to in [section 1 of the charter amendment] actually existed." We have already held herein that the existence of such an emergency is not a constitutional prerequisite for the imposition of rent controls. Plaintiffs contend however that the declaration in the charter amendment's preamble of the existence of "a serious public emergency" ***164** with respect to housing problems in Berkeley (§ 1, quoted in fn. 28, *ante*) makes the amendment invalid unless such an emergency actually existed even though the amendment would be valid in the absence of such declaration. With this contention plaintiffs challenge the measure not by disputing its statement of *constitutional* facts but by disputing statements *not necessary* to constitutionality. Their position is that the city electorate cannot have intended to adopt the charter amendment unless the preamble's statement of underlying facts were true and that such truth can be determined by a court which can then declare the measure invalid if it finds upon sufficient evidence that the statement is incorrect.

(17) Even if it be assumed that legislation can be invalidated for mistakes in its preamble concerning facts not essential to constitutionality or legislative authority, the mistakes asserted here are not grounds for invalidation. They involve at most only descriptive differences in the degree of seriousness of the housing problems sought to be remedied and any question of their correspondence with the findings could have been completely eliminated by only minor changes of wording. [FN29]The preamble accurately declares the nature of the conditions to be alleviated and it is to be presumed that the Berkeley electorate became sufficiently informed from election campaign arguments for and against the measure to decide for themselves whether those conditions gave rise to a "public emergency" or were simply "serious." The ballot argument in favor of the charter amendment contained no representation of the existence of any emergency. We conclude that the "emergency" wording of the preamble did not prevent the adoption of rent controls to deal with those conditions described in the preamble which are consistent with the trial court's findings.

> FN29 Section 1 of the charter amendment would unquestionably be consistent with the findings if the following five words shown as stricken were replaced by the wording shown in italics: "Statement of Purpose. A growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock constitute a serious public emergency *housing problem* affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing. These emergency conditions endanger the public health and welfare of the City of Berkeley and especially the health and welfare of the poor, minorities, students and the aged. The purpose of this Article, therefore, is to alleviate the hardship caused by this emergency *problem* by establishing a Rent Control Board empowered to regulate residential housing and rentals in the City of Berkeley."

*Constitutional Deficiencies in Charter Amendment's Provisions for Fixing Maximum Rents****165**

Having sustained defendant's power to limit residential rents within the city for the purpose stated in the charter amendment, we now consider the constitutionality of the means provided by the amendment for fixing and adjusting permissible rents. As already stated these means are within the police power if they are reasonably related to the legislative purpose. "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." (*Nebbia v. New York, supra*, 291 U.S. 502, 539 [78 L.Ed. 940, 958]; accord, *Permian Basin Area Rate Cases* (1968) 390 U.S. 747, 769-770 [20 L.Ed.2d 312, 337-338, 88 S.Ct. 1344].)

The charter amendment declares that its rent control provisions are intended to counteract the ill effects of "rapidly rising and exorbitant rents exploiting [the housing] shortage." (§ 1.) The provisions are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory. (*Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575, 585-586 [86 L.Ed. 1037, 1049-1050, 62 S.Ct. 736]; *Hutton Park Gardens* v. *Town Council, supra*, 68 N.J. 543, 565-571 [350 A.2d 1, 13-16].)

Defendant and interveners contend that any present consideration of the possible confiscatory effect of the charter amendment is premature until the amendment has been allowed to become operative and the actual rent ceilings imposed under it can be measured against constitutional standards. It is true that whether a regulation of prices is reasonable or confiscatory depends ultimately on the result reached. (*Power Comm'n v. Hope Gas. Co.* (1944) 320 U.S. 591, 602 [88 L.Ed. 333, 344-345, 64 S.Ct. 281].) However, such a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties. (*City of Miami Beach v. Forte Towers, Inc.* (Fla. 1974) 305 So.2d 764, 768; see *Mora v. Mejias* (1st Cir. 1955) 223 F.2d 814.)It is to the possibility of such facial invalidity that our present inquiry is directed.

As heretofore explained the charter amendment establishes the maximum rent chargeable for each housing unit by fixing the unit's base ***166** rent and providing for subsequent upward or downward adjustments on a unit-by-unit basis. We consider first the base rent provision. The base rent is stated to be "the rent in effect on August 15, 1971 or any rent in effect subsequent to this date if it was less. If no rent was in effect on August 15, 1971, ... the base rent shall be established by the [Rent Control] Board based on the generally prevailing rents for comparable units in the City of Berkeley." (§ 4.) Rent control enactments typically use the rent charged on a prior date as a starting point for the fixing of maximum rents on the theory that it approximates the rent that would be paid in an open market without the upward pressures that the imposition of rent control is intended to counteract. (See *Delaware Valley Apt. House Own. Ass'n. v. United States* (E.D.Pa. 1972) 350 F.Supp. 1144,aff'd, 482 F.2d 1400; *Chatlos* v. *Brown* (Em.App. 1943) 136 F.2d 490, 493.)The prior date is set early enough to avoid incorporating last-minute increases made by landlords in anticipation of the controls. (See *Marshal House, Inc. v. Rent Control Board* (1971) 358 Mass. 686, 701 [266 N.E.2d 876].)

(18) Selection of August 15, 1971, as the key date for determination of base rents under the charter amendment was appropriate and reasonable. The possibility of rent controls in Berkeley arose at least as early as March 1971 when controls were recommended in a minority report of the city council's rental housing committee. (See fn. 3, *ante*.)On August 15, 1971, the President of the United States, acting pursuant to the Economic Stabilization Act of 1970 (Pub. L. No. 91-379, 84 Stat. 799), ordered all rents frozen for 90 days at their highest level during the 30-day period prior to August 15, 1971. (Exec. Order No. 11615, 36 Fed. Reg. 15727.)Subsequent rent controls under the act used August 15, 1971, as the primary base date for calculating maximum rents. (See 6 C.F.R., pt. 301, 37 Fed. Reg. 13226 (July 4, 1972).) FN30 Thus the advantages of selecting August 15, 1971, as the key date for base rents under the charter amendment were that (1) it marked the latest time at which rents had been set in an unregulated market and (2) the importance of the date under the federal regulatory scheme greatly increased the probability that landlords would have records concerning rents on

that date readily available.

FN30 The act expired on April 30, 1974. (Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 8, 87 Stat. 29.)

The charter amendment provides that the rollback of rents to base levels is to take effect 90 days after election of the rent control board.***167** (§ 4.) This election was held on January 23, 1973, but the rollback was enjoined by preliminary injunction on April 26, 1973, and enforcement of the entire charter amendment was thereafter enjoined by the present judgment on June 22, 1973. Plaintiffs contend that marked rises in property taxes, utility rates, and the costs of goods and services since 1973 have eliminated any reasonable grounds which then existed for using August 15, 1971, as a rollback date and have made it highly probable if not certain that the present imposition of such a rollback would reduce rents to confiscatorily low levels pending individual upward adjustments. Interveners reply to this contention by pointing out that the present litigation has caused at least a three-year postponement in the charter amendment's operation which was not contemplated by those who selected the rollback date. Interveners propose that we remedy the problem created by the postponement by setting a new rollback date or by ordering that appropriate relief be provided upon remand. Such action on our part is unnecessary in view of our hereinafter explained conclusion that the charter amendment's provisions for *adjusting* maximum rents are constitutionally insufficient to relieve landlords from confiscatory rent levels even if the base rents were keyed to a more current date. To eliminate any issue of the propriety of using August 15, 1971, as the date for fixing base rents under section 4, we assume for purposes of the remaining discussion that the date used for this purpose would be the date this opinion is filed.

We turn to the charter amendment's provisions for adjustment of maximum rents. Plaintiffs contend that these provisions fail to provide sufficient standards for the guidance of the rent control board in acting upon petitions for increases or decreases in maximum rents and thereby constitute an unlawful delegation of legislative power. (19) A municipal legislative body is constitutionally prohibited from delegating the formulation of legislative policy but may declare a policy, fix a primary standard, and authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement the policy and standard and to determine the application of the policy or standard to the facts of particular cases. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-376 [71 Cal.Rptr. 687, 445 P.2d 303].)

The charter amendment provides that "[i]n reviewing ... petitions for [rent] adjustments, the Board shall consider relevant factors including but not limited to the following: (a) increases or decreases in property taxes; (b) unavoidable increases or decreases in operating and maintenance expenses; (c) capital improvement of the rent-controlled unit, as ***168** distinguished from ordinary repair, replacement and maintenance; (d) increases or decreases in living space, furniture, furnishings or equipment; (e) substantial deterioration of the rent-controlled unit other than as a result of ordinary wear and tear; and (f) failure on the part of the landlord to provide adequate housing services." (§ 5.) It is argued that this listing of factors does not adequately inform either the Board or a court reviewing the Board's actions just how the presence of the factors under particular circumstances is to be translated into dollar increases or decreases in rent. Another criticism is the omission of factors that might have prevented the base rent from reflecting general market conditions such as a seasonal fluctuation in the demand for the kind of housing involved or the existence of a special relationship between landlord and tenant resulting in an undercharging of rent. (See *Hillcrest Terrace Corp. v. Brown* (Em.App. 1943) 137 F.2d 663.)

However, section 5 provides that the foregoing factors which it lists are not exclusive but illustrative of the "relevant factors" to be considered by the Board. Moreover, the Board is given other significant guidance by the charter amendment's statement of purpose in section 1. (20) Standards sufficient for administrative application of a statute can be implied by the statutory purpose. (*In re Marks* (1969) 71 Cal.2d 31, 51 [77 Cal.Rptr. 1, 453 P.2d 441]; *In re Petersen, supra*, 51 Cal.2d 177, 185-186.) Here the charter amendment's purpose of counteracting the ill effects of "rapidly rising and exorbitant rents exploiting [the housing] shortage" (§ 1.) implies a standard of fixing maximum rent levels at a point that permits the landlord to charge a just and reasonable rent and no more. (*Hutton Park Gardens v. Town Council, supra*, 68 N.J. 543 [350 A.2d 1, 16].) Indeed section 3, subdivision (g), directs the Board to "issue and follow such rules and regulations, including those which are contained in this Article, *as will further the purposes of this Article*." (Italics supplied.)

"The rule that the statute must provide a yardstick to define the powers of the executive or administrative officer is easy to state but rather hard to apply. Probably the best that can be done is to state that the yardstick must be as definite as the exigencies of the particular problem permit." (*Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 902 [216 P.2d 882].) By stating its purpose and providing a nonexclusive illustrative list of relevant factors to be considered, the charter amendment provides constitutionally sufficient legislative guidance to the Board for its determination of petitions for adjustments of maximum rents. ***169**

However, legislative guidance by way of policy and primary standards is not enough if the Legislature "fail[s] to establish an effective mechanism to assure the proper implementation of its policy decisions." (*Kugler v. Yocum, supra*, 69 Cal.2d 371, 376-377.) "The need is usually not for standards but for safeguards. ... When statutes delegate power with inadequate protection against unfairness or favoritism, and *when such protection can easily be provided*, the reviewing courts may well either insist upon such protection or invalidate the legislation." (Italics supplied.) (1 Davis, Administrative Law Treatise (1958) § 2.15; see *Kugler* v. *Yocum, supra*, 69 Cal.2d at p. 381.)

(21) Here the charter amendment drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings. It is clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory. For such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them ...." (*Smith v. Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591 [70 L.Ed. 747, 749, 46 S.Ct. 408] (enjoining enforcement of telephone rates because of unreasonable delay in acting upon application for rate increase).) The charter amendment is constitutionally deficient in that it withholds powers by which the rent control board could adjust maximum rents without unreasonable delays and instead requires the Board to follow an adjustment procedure which would make such delays inevitable.

The provisions of the charter amendment in which those delays inhere must be examined in relation to the magnitude of the job to be done. The amended complaint alleges that Berkeley has some 30,000 rental units of which 22,000 are subject to rent control under the charter amendment. Although this allegation is denied for lack of sufficient information or belief and the findings do not directly resolve the issue, they do state that the city's population is 116,000 of whom 63 percent, or 73,080, are tenants. The findings also indicate that the city has at least ***170** 16,000 rental units, and the trial court's memorandum opinion indicates there are over 17,000 *apartment* rental units. [FN31]

FN31 A finding states that "there existed a vacancy rate in excess of 3% (actual number of vacancies approximating 500 rental units)" and another finding states the vacancy rate "increased from 2.6% to 3.1% between 1971 and 1972." The memorandum opinion states that "the apartment rental unit vacancy rate rose from 2.6 in 1971 to 3.1 in 1973. (In actual numbers, an increase from 467 to 534.)" The indicated number of units is determined by dividing the vacancy rate into the number of vacancies.

The Board has no power to adjust rent ceilings on any one of these thousands of units until it has received a separate petition for that unit and considered the petition at an adjustment hearing. (§ 5, 1st. par.; § 6, subd. (a); see fn. 7, *ante.*)A landlord may not file a petition without simultaneously filing a certificate from the city building inspection service that the premises comply with state and city codes based upon an inspection made within the preceding six months. (§ 5, 3d par.) [FN32]Consolidation of petitions for hearing is permitted only if they relate to units in the same building and then only with the written consent of a majority of the tenants. (§ 6, subd. (h).) [FN33] Any rent adjustment must be "supported by the preponderance of the evidence submitted at the hearing." (§ 6, subd. (g).) The public hearing record must include "all exhibits, papers and documents required to be filed or accepted into evidence during the proceeding; a list of all participants present; a summary of all testimony accepted in the proceeding; a statement of all ***171** materials officially noticed; all findings of fact; the ruling on each exception or objection, if any are presented; all recommended decisions, orders or rulings; all final decisions and/or orders; and the reasons for each recommended and each final decision, order or ruling." (§ 6, subd. (f).)

FN32 Defendant contends that "nothing in the law's procedures prevents consideration by the Board of a petition for rental adjustment that is not accompanied by a building certification" and that "the Board may consider a petition which is accompanied by an adequate excuse for the failure to supply a building certification - such as delay by the City Building and Inspection Services." But the charter amendment (§ 5) states unequivocally that "[a]ny landlord who petitions the Board for an upward rent adjustment *shall* file with such petition a certification ... that the premises in question are in full and complete compliance with the applicable [codes] ...." (Italics supplied.) The power of the board to make findings contrary to the certificate and nevertheless grant a rent increase does not affect the requirement that the certificate be filed.
Plaintiffs contend that the charter amendment would deny them due process by failing to provide landlords with any remedy against arbitrary refusal of the required certification or unreasonable delay in its issuance. Nothing in the charter amendment inhibits defendant's city council, Board or other organs from exercising their respective powers to prevent or alleviate such refusals or delays and therefore we cannot assume that any such denial of due process would occur.

FN33 Defendant argues that "there is no proscription against consolidating petitions and hearing procedures on the petitions submitted, in order to make [rental] adjustments, except in the case of petitions relating to rent-controlled units in the same building where written consent of a majority of tenants is required." We disagree. The requirement of written consent for consolidation of petitions for units in the same building evinces a policy of prohibiting the Board from consolidating petitions that are *less* related in that they pertain to separate buildings.

Moreover, the Board is precluded from delegating the holding of hearings to a staff person or even to one or a panel of its members. No adjustment can be granted "until after *the Board* considers the petition *at an adjustment hearing*." (Italics supplied.) (§ 6, subd. (a).) Of the five members of the Board (§ 3, subd. (a)) three constitute a quorum and "[t]hree affirmative votes are required for a decision, including all motions, orders, and rulings of the Board." (§ 3, subd. (i).) Yet Board members are not compensated as full-time officials. Each member is to be paid $50 per meeting but is limited to a maximum annual compensation of $2,400. (§ 3, subd. (k).)

These provisions put the Board in a procedural strait jacket. It cannot order general rental adjustments for all or any class of rental units based on generally applicable factors such as property taxes. FN34It cannot terminate controls over any housing. It cannot consider a landlord's petition that is not accompanied by a current building inspection certificate of code compliance. It cannot dispense with a full-blown hearing on each adjustment petition even though all nonpetitioning parties are given ample notice and none requests to be heard. It cannot accept petitions pertaining to more than one unit or consolidate petitions pertaining to individual units for hearing even in the absence of objection except when the majority of the tenants in a building give written consent to consolidation of the petitions relating to that building. FN35It cannot delegate the holding of hearings to a hearing officer or a member of the Board. In short, it is denied the means of reducing its job to manageable proportions through the formulation and application of general rules, the appropriate delegation of responsibility, and the focusing of the adjudicative process upon issues which cannot fairly be resolved in any other way. ***172**

FN34 Section 3, subdivision (g), directs the Board to "issue and follow such rules and regulations ... as will further the purposes of this Article," but such rules could not undercut the express provision that "[n]o rent adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing" (§ 6, subd. (g)).

FN35 Although tenants of a building would have an understandable motive for agreeing to consolidation of their own petitions for rent *decreases*, they would ordinarily have little or nothing to gain from signing a consent to a consolidation designed to make it easier for the landlord to obtain permission to raise their rents.

The impracticability of regulating an enormous number of highly varied transactions wholly on a case-by-case basis has frequently led to regulation by means of rules and schedules derived from evidence typical of the members of the regulated group, subject to the right of any member to make a showing of sufficient deviation from the norm to warrant special treatment. One of the important reasons that hearings on the circumstances of each individual's situation are not constitutionally required for the imposition of regulation in such cases is that such individual treatment would be impracticable. (*Permian Basin Area Rate Cases, supra*, 390 U.S. 747, 756-758, 768-770 [20 L.Ed.2d 312, 329-331, 336-338]; *Chicago & N. W. R. Co. v. A., T. & S. F. R. Co.* (1967) 387 U.S. 326, 340-343 [18 L.Ed.2d 803, 813-816, 87 S.Ct. 1585]; *New England Divisions Case* (1923) 261 U.S. 184, 196-199 [67 L.Ed. 605, 612-614, 43 S.Ct. 270]; *Wilson v. Brown* (Em.App. 1943) 137 F.2d 348, 352-354; *Amalgamated Meat Cutters & Butcher Work. v. Connally* (D.D.C. 1971) 337 F.Supp. 737, 758.)In the present case the *imposition* of rent ceilings in the form of a rollback to base rents is virtually automatic. Thereafter, regardless of how inequitable any rent ceiling may be under all the circumstances, it cannot be adjusted except by a procedure that inherently and unnecessarily precludes reasonably prompt action except perhaps for a lucky few.

Defendant and interveners argue that any concern over whether maximum rents will be adjusted with a constitutional minimum of promptitude is speculative and premature because it must be presumed that the Board will not deliberately deprive landlords of their constitutional rights. They refer us to *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 149 [82 P.2d 434, 126 A.L.R. 838], where we said: "It is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board *and not the statute*." (Italics supplied.) The delays in rent adjustment with which we are concerned stem not from any anticipated dereliction of duty on the part of the rent control board but from defects in the charter amendment itself.

FN36 Interveners postulate that a landlord's application for an upward rent adjustment under the charter amendment would be acted upon in two or three months, citing a study which states that under the Massachusetts rent control law (Mass. Acts 1970, ch. 842) "[t]he average length of time between filing a petition and receiving a decision from the Rent Control Board ranges from four to five weeks in Somerville to 10 to 12 weeks in Brookline." But the Massachusetts statute gives local rent control boards the very powers which we have described as being withheld from the Berkeley Board by the charter amendment.

Interveners also attach to one of their briefs a declaration of the person who served as the Berkeley Rent Control Board's chief executive officer prior to the judgment below, describing the Board's plans for dealing with petitions for rent adjustments. We consider the declaration not as evidence of any facts or occurrences but for whatever light it may shed on the kinds of adjustment procedures that might be possible under the charter amendment. The declaration states in part: [¶] "The Board never completed action on determining the exact procedures to be followed in dealing with applications for rent adjustments. However, all of the proposals being considered involved the development of standardized formulae and procedures for determining the approved rent on any given rental unit. The Board's goal was to develop a formula that would allow it to calculate the rent it would approve on a given housing unit simply by taking into account data that would be provided yearly involving the owner's costs and equity investment in the building being considered. To the figure thus calculated, an adjustment would be made depending upon whether the building was 'average,' 'above average,' or 'below average,' in its condition and maintenance. Evidence as to condition and maintenance would be provided by the owner and tenants themselves as well as investigators working for the Board. The goal of these procedures was to be standardized and virtually automatic decisions in cases, with the Board setting policies to be administered by its staff. These policies would, hopefully, minimize contested hearings and allow decisions in the overwhelmingly vast majority of cases to be worked out informally by interested parties and the Board staff. Where decisions could not be worked out informally, hearing would be held by Board hearing officers with final decisions to be made by the Board. With these procedures, we anticipated that any given rent adjustment request could be handled and closed within

30 to 45 days."

The difficulty with these plans is that they were beyond the Board's powers under section 6. Rent adjustment decisions could not be worked out informally between the parties and the Board staff but in *all* cases would have to be based on the preponderance of the evidence submitted at a hearing on a particular rental unit, documented by a detailed hearing record. Moreover, hearings could not be held by "hearing officers" but only by the Board itself.

A different question would be presented if the delays inherent in the charter amendment's requirement that rents be adjusted only on the basis of unit-by-unit hearings before a single tribunal were essential to its purpose. Clearly the Board's powers could be broadened so as to ameliorate the delays sufficiently while preserving the rights of all concerned. Nor do we preclude the possibility of other legislative solutions to the problem. But under the charter amendment as it now stands the combination of the rollback to base rents and the inexcusably cumbersome rent adjustment procedure is not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive the plaintiff landlords of due process of law if permitted to take effect.

Finally there appears no way of severing the invalid limitations on the Board's powers to adjust maximum rents from the remainder of the charter amendment. The constitutional defect cannot be cured simply by excision but only by additional provisions that are beyond our power to provide. (*Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 871 [94 Cal.Rptr. 777, 484 P.2d 945].) Moreover, the argument in support of the charter amendment distributed to the electors who voted on its adoption assured ***174** them that the measure "establishes an elected five member Rent Control Board to regulate rents ... and evictions in Berkeley on a case by case basis. ... [T]he plan proposed here is extremely flexible [*sic*], with each case handled individually by the Board." Thus it is by no means clear that the electorate would have approved the measure if the Board had been given broader rental adjustment powers. (See *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 695 [97 Cal.Rptr. 1, 488 P.2d 161]; *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 580-582 [203 P.2d 758].)

The judgment is affirmed.

McComb, J., Tobriner, J., Mosk, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

APPENDIX: AMENDMENT TO BERKELEY CITY CHARTER (Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372)

That the first sentence of Section 8 of Article V of the Charter of the City of Berkeley be amended and a new Article XVII, consisting of twelve (12) sections, be added to the Charter of the City of Berkeley to read as follows:

Section A. Add the following new Article XVII:

1. Statement of Purpose. A growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock constitute a serious public emergency affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing. These emergency conditions endanger the public health and welfare of the City of Berkeley and especially the health and welfare of the poor, minorities, students and the aged. The purpose of this Article, therefore, is to alleviate the hardship caused by this emergency by establishing a Rent Control Board empowered to regulate residential housing and rentals in the City of Berkeley.

2. Definitions: The following words or phrases as used in this Charter Amendment shall have the following meanings:

a) Board: The Rent Control Board established by Section 3 of this amendment.

b) Commissioners: Commissioners of the Rent Control Board established by Section 3 of this amendment.

c) Controlled rental units: All rental units in the City of Berkeley except:

(1) rental units in hotels, motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days; ***175**

(2) rental units in non-profit cooperatives;

(3) rental units in any hospital, convent, monastery, extended medical care facility, asylum, non-profit home for the aged, or dormitory owned and operated by an institution of higher education;

(4) rental units which a governmental unit, agency or authority either owns, operates, manages, or subsidizes.

d) Housing services: Housing services include but are not limited to repairs, replacement, maintenance, painting, providing light, heat, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

e) Landlord: An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent or successor of any of the foregoing.

f) Rent: The consideration, including any bonus, benefits or gratuity demanded or received for or in connection with the use or occupancy of rental units or the transfer of a lease for such rental units, including but not limited to monies demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

g) Rental housing agreement: An agreement, verbal, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

h) Rental units: Any building, structure, or part thereof, or land appurtenant thereto, or any other real property rented or offered for rent for living or dwelling purposes, including houses, apartments, rooming or boarding house units, and other properties used for living or dwelling purposes, together with all housing services connected with the use or occupancy of such property.

i) Tenant: A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

3. Rent Control Board:

a) Composition: There shall be in the City of Berkeley a Rent Control Board. The Board shall consist of five elected Commissioners. The Board shall elect annually as chairwoman or chairman one of its members to serve in that capacity.

b) Eligibility: Residents of the City of Berkeley who are duly qualified electors of the City of Berkeley are eligible to serve as Commissioners of the Rent Control Board.

c) Full disclosure of holdings: Candidates for the position of Rent Control Board Commissioner, in addition to fulfilling the requirements of Article III, Section 6 1/2, when filing nomination papers, shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, and investment in and association with partnerships, corporations, joint ventures and syndicates engaged in its ownership, sale or management, during the previous three (3) years.

d) Method of election: Commissioners shall be elected at general municipal elections in the same manner as set forth in Article III, except that the first Commissioners shall be elected within 180 days after approval of this Article by the State Legislature in accordance with the provisions of Article III.

e) Term of office: Commissioners shall be elected to serve terms of four years, except that of the first five Commissioners elected in accordance with Section 3(d), the two Commissioners receiving the most votes shall serve until the first general municipal election held more than three years after their election and the remaining three Commissioners shall serve until the first general municipal election held more than one year after their election. Commissioners shall serve a maximum of two full terms.

f) Powers and duties: The Rent Control Board is empowered to set maximum rents for all residential rental units in the City of Berkeley with the exception of those classes ***176** of units exempted under Section 2(c). The Board is empowered to roll back rents to a base rent established under Section 4(a). The Board is empowered to adjust maximum rents either upward or downward after conducting appropriate investigations and hearings as provided under Section 6. The Board may make such studies and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties. The Board may seek injunctive relief under the provisions of Section 11 in order to carry out its decisions and may settle civil claims in accordance with the provisions of Section 10.

g) Rules and regulations: The Rent Control Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of this Article. The Board shall publish its rules and regulations prior to promulgation in at least one newspaper with general circulation in the City of Berkeley. All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying. The Board shall publicize this Charter Amendment through the media of signs, advertisements, flyers, leaflets, announcements on radio and television, newspaper articles and other appropriate means, so that all residents of Berkeley will have the opportunity to become informed about their legal rights and duties under rent control in Berkeley.

h) Meetings: The Board shall hold two regularly scheduled meetings per month. Special meetings may be called upon the request of at least two Commissioners. All meetings shall be open to the public. Maximum rent adjustment and eviction hearings shall be conducted in accordance with the provisions of Sections 6 and 7.

i) Quorum: Three Commissioners shall constitute a quorum. Three affirmative votes are required for a decision, including all motions, orders, and rulings of the Board.

j) Dockets: The Board shall maintain and keep in its office rent adjustment and eviction certificate hearing dockets. Said dockets shall list the time, date, place of hearing, parties involved, the addresses of the buildings involved, and the final disposition of the petitions heard by the Board.

k) Compensation: Each Commissioner shall receive for every meeting fifty dollars ($50.00), but in no event shall any Commissioner receive in any twelve month period more than twenty-four (24) hundred dollars for services rendered.

l) Vacancies: If a vacancy shall occur on the Board, the Board shall appoint a qualified person to fill such a vacancy until the following general municipal election when a qualified person shall be elected to serve for the remainder of the term.

m) Recall: Commissioners may be recalled in accordance with the provisions of Article IV of the Charter of the City of Berkeley.

n)Staff: The Board shall employ, subject to the approval of the City Council, such staff as may be necessary to perform its functions. Board staff shall not be subject to the requirements of Article VII, Section 28 (b) and (c) and Article IX, Section 56 of the City Charter.

4. Maximum Rent:

a) Base rent: The base rent shall be the rent in effect on August 15, 1971 or any rent in effect subsequent to this date if it was less. If no rent was in effect on August 15, 1971, as in the case of newly constructed units completed after this date, the base rent shall be established by the Board based on the generally prevailing rents for comparable units in the City of Berkeley. The base rent shall take effect ninety (90) days after the election of the Board and the Board shall administer a rollback of rents in all controlled units to this level and shall determine, where necessary, the actual rent level in effect on August 15, 1971. Upon approval of this Charter Amendment by the California State Legislature and pending the establishment of base rents and the rollback of rents to the base rent level, no landlord shall increase rents in a rent-controlled unit.

b) Registration: The Board shall require registration of all rent-controlled units, their ***177** base rents, and the housing services provided on forms authorized and voted by the Board.

5) Maximum Rent Adjustments:

The Board may make individual rent adjustments, either upward or downward, of the maximum rent established as the base rent for rent-controlled units under Section 4(a). The Board shall receive petitions from landlords and tenants for such adjustments, and shall conduct hearings in accordance with the provisions of Section 6 to rule on said petitions.

In reviewing such petitions for adjustments, the Board shall consider relevant factors including but not limited to the following: a) increases or decreases in property taxes; b) unavoidable increases or decreases in operating and maintenance expenses; c) capital improvement of the rent-controlled unit, as distinguished from ordinary repair, replacement and maintenance; d) increases or decreases in living space, furniture, furnishings or equipment; e) substantial deterioration of the rent-controlled unit other than as a result of ordinary wear and tear; and f) failure on the part of the landlord to provide adequate housing services.

Any landlord who petitions the Board for an upward rent adjustment shall file with such petition a certification from the City of Berkeley Building Inspection Service which states that the premises in question are in full and complete compliance with the applicable State of California Health and Safety Codes and the City of Berkeley Housing Code based on an inspection made no more than six months prior to the date of the landlord's petition. Such certification shall be prima facie evidence of the nonexistence of Code violations, rebuttable by other competent evidence introduced by the tenant, certification notwithstanding. The Board may refuse to grant an upward adjustment if it determines that the rent-controlled unit in question does not comply with the requirements of the aforementioned Codes and if it determines that such lack of compliance is due to the landlord's failure to provide normal and adequate housing services.

6. Maximum Rent Adjustment Hearings:

a) Petitions: The Board shall consider an adjustment of rent for an individual rent-controlled unit upon receipt of a petition for adjustment filed by the landlord or tenant of such a unit on a form provided by the Board. No such adjustment shall be granted until after the Board considers the petition at an adjustment hearing.

b) Notice: The Board shall notify the landlord, if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition. The Board shall schedule a hearing no earlier than the sixteenth (16th) day after the postmark of the notice of the hearing sent to the parties and shall notify both parties as to the time, date and place of the hearing. Hearings shall be scheduled for times most convenient for all parties, including evenings and weekends. Hearing may be postponed or continued for good cause provided that all parties receive notice timely of such action.

c) Records: The Board may require either party to a rent adjustment petition to provide it with all pertinent books, records and papers. Such documents shall be made available to the parties involved at least seven days prior to the hearing at the office of the Rent Control Board.

d) Open hearings: All rent adjustment hearings shall be open to the public.

e) Right to assistance: All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, tenant union representatives or any other persons designated by said parties.

f) Hearing record: The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and ***178** documents required to be filed or accepted into evidence during the proceeding; a list of participants present; a summary of all testimony accepted in the proceeding; a statement of all materials officially noticed; all findings of fact; the ruling on each exception or objection, if any are presented; all recommended decisions, orders or rulings; all final decisions and/or orders; and the reasons for each recommended and each final decision, order or ruling.

g) Decisions: The Board shall make a final decision no later than fifteen days after the conclusion of the hearing. No rent adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the Board's decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to judicial review of the decision pursuant to Section 9 of this Charter Amendment.

h) Consolidation: The Board may consolidate petitions relating to rent-controlled units in the same building with the written consent of a majority of the tenants and all such petitions may be considered in a single hearing.

i) Repetition: Notwithstanding any other provision of this Section, the Board may, without holding a hearing, refuse to adjust a maximum rent level upward for an individual rental unit if a hearing has been held with regard to the rental level of such unit within the prior twelve months.

j) Inadequate or false information: If information filed in a petition for rent adjustment or in additional submissions filed at the request of the Board is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

7. Evictions:

a) No landlord shall bring any action to recover possession of a rent-controlled unit unless:

(1) the tenant has failed to pay the rent to which the landlord is entitled under the rental housing agreements; (2) the tenant has violated an obligation or covenant of her or his tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord; (3) the tenant is committing or permitting to exist a nuisance in, or is causing substantial damage to, the rent-controlled unit, or is creating a substantial interference with the comfort, safety or enjoyment of the landlord or other occupants of the same; (4) the

tenant is convicted of using or permitting a rent-controlled unit to be used for any illegal purpose; (5) the tenant, who had a rental housing agreement which has terminated has refused after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not consistent with or violative of any provisions of this Charter Amendment and are materially the same as in the previous agreement; (6) the tenant has refused the landlord reasonable access to the rent-controlled unit for the purpose of making necessary repairs or improvement required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of inspection as permitted or required by the rental housing agreement or by law or for the purpose of showing the rental housing unit to any prospective purchaser or mortgagee; (7) the tenant holding at the end of the term of the rental housing agreement is a subtenant not approved by the landlord; (8) the landlord seeks to recover possession in good faith for use and occupancy of herself or himself, of her or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law; or (9) the landlord seeks to recover possession to demolish or otherwise remove the rent-controlled unit from housing use.

b) A landlord seeking to recover possession of a rent-controlled unit shall apply to the Board for a certificate of eviction. Such application shall include a copy of the notice to quit served on the tenant(s) and must contain statements made under pains and penalties ***179** of perjury that: (1) there are no outstanding Code violations on the premises or, if there are any, they were all substantially caused by the present tenants; (2) the landlord or her or his agent has properly sent to or personally served on the tenant a notice terminating the tenancy and said notice has taken legal effect; and (3) there exist facts which justify issuance of a certificate of eviction under Section 7(a).

c) The Board shall notify all concerned tenants of the landlord's application for a certificate of eviction and of their right to contest issuance of such a certificate by requesting a hearing within five (5) days after receiving such notification from the Board. Said notification shall include a copy of the landlord's application and statements and attachments.

d) If the tenant requests such a hearing, the Board shall schedule such a hearing within seven (7) days after receipt of the tenant's request and notify all parties as to the time, date and place of the hearing.

e) At said hearing the burden of proof is on the landlord to prove the facts attested to in her or his application. No eviction certificate shall be issued if: (1) the landlord fails to prove that no Code violations exist on the premises or that any violations which do exist were substantially caused by the present tenant(s); or (2) the eviction is in retaliation for reporting Code violations or violations of this Article, or for organizing other tenants, or for enforcing rights under this Charter Amendment. The provisions of Section 6(d), (e), (f), (g), (h), (i), and (j) apply in a similar manner to eviction hearings.

f) The Board shall grant or deny the certificate of eviction within five (5) days after a hearing is held on the landlord's application.

g) A landlord who seeks to recover possession of a rent-controlled unit without first obtaining a certificate of eviction or who recovers possession without first obtaining a certificate of eviction shall be in violation of this Article and shall be subject to the civil penalties available to the Board, the City or the tenant under Section 10. This subsection shall not apply if, after the landlord has applied for a certificate of eviction, the tenant voluntarily abandons the rent-controlled unit. The provisions of this Section shall be construed as additional restrictions on the right to recover possession of rent-controlled units. No provision of this Section shall entitle any landlord to recover possession of such a rent-controlled unit. Upon a decision of the Board concerning the granting or withholding of a certificate of eviction, either party may seek judicial review of this decision in accordance with the provisions of Section 9.

8. Non-Waiverability:

Any provision whether oral or written, in or pertaining to a rental housing agreement whereby any provisions of this Article for the benefit of a tenant is waived, shall be deemed to be against public policy and shall be void.

9. Judicial Review:

A landlord or tenant aggrieved by any action, regulation, or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

10. Civil Remedies:

a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule, regulation or order hereunder promulgated, shall be liable as hereinafter provided to the tenant from whom such payment is demanded, accepted, received or retained, for reasonable attorney's fees and costs as determined by the court, plus damages in the amount of two hundred dollars ($200.00) or not more than three (3) times the amount by which the payment or payments demanded, accepted, received or retained, whichever is the greater. ***180**

b) If the tenant from whom such payment is demanded, accepted, received, or retained in violation of the provision of this Article or any rule, regulation or order hereinunder promulgated fails to bring an action under this Section within thirty days from the date of the occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereinafter, the tenant on whose behalf the Board acted is barred from also bringing action against the landlord in regard to the same violation for which the Board has made a settlement. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in the settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

c) A judgment for damages or on the merits in any action under this Section shall be a bar to any recovery under this Section against the same landlord on account of any violation with respect to the same tenant prior to the institution of the action in which such judgment was rendered. Action to recover liquidated damages under the provisions of this Section shall not be brought later than one year after the date of the violation.

d) The Municipal or Superior Court, as the case might be, within which the rent-controlled unit affected is located shall have jurisdiction over all actions and complaints brought under this Section.

e) Any tenants who have paid in excess of the maximum rent set by the Board as determined at a hearing held by the Board or whose rent was suspended due to a violation of this Article shall be entitled to a refund in the amount of the excess payment. Tenants may elect to deduct such amount of the refund due them from their future rent payments, rather than pursuing the remedy provided under Section 10(a), provided that they inform the landlord in advance in writing as to their intention to do so. Tenants shall not be penalized by landlords for deducting their refund pursuant to this Section.

f) If a landlord evicts a tenant without a certificate of eviction obtained from the Board, the tenants' obligation to pay rent to the landlord during the period beginning with the date of the actual eviction and continuing for the period in which the tenant is dispossessed for a maximum of one year is automatically suspended and the tenant is entitled to a refund of rent in accordance with the provisions of Section 10(e).

11. Injunctive Relief: The Board and tenants and landlords of rent-controlled units may seek relief from a Municipal or Superior Court to restrain by

injunction any violation of this Article and of the rules, regulations and decisions of the Board.

12. Partial Invalidity: If any provision of this Article or application thereof to any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

Section B. The first sentence of Section 8, Article V of the Charter of the City of Berkeley is amended to read as follows: "The elective officers of the City shall be a Mayor, an Auditor, eight (8) Council Members, five (5) School Directors, and five (5) Rent Control Board Commissioners." ***181**

Cal.
Birkenfeld v. City of Berkeley
17 Cal.3d 129, 550 P.2d 1001, 130 Cal.Rptr. 465

END OF DOCUMENT

EXHIBIT 4

Westlaw.

C
Briggs v. Lawrence
Cal.App.6.Dist.

BILLY LEO BRIGGS, Plaintiff and Appellant,
v.
MICHAEL LAWRENCE et al., Defendants and Respondents.
No. H007557.

Court of Appeal, Sixth District, California.
May 23, 1991.

SUMMARY

After plaintiff was acquitted of murder charges, the trial court ordered him to pay reimbursement for the cost of his defense. Plaintiff brought an action for legal malpractice against the two public defenders who had represented him, alleging that their inadequate representation in the reimbursement proceedings caused him to be found liable for reimbursement. Defendants demurred and moved for judgment on the pleadings. The trial court sustained the demurrers and granted the motions for judgment on the pleadings. (Superior Court of Monterey County, No. 90323, Robert M. Hinrichs, Judge.)

The Court of Appeal affirmed. It held that plaintiff was not collaterally estopped to assert that defendants' representation in the reimbursement proceedings was inadequate, even though the order in the reimbursement proceeding contained a finding that defendants had "adequately represented [plaintiff] in all proceedings ...." However, the trial court did not err in sustaining the demurrers and granting defendants' motions for judgment on the pleadings, since plaintiff's complaint failed to allege that he had filed a claim in compliance with the Tort Claims Act (Gov. Code, § 810 et seq.) prior to filing suit. The court held that a salaried full-time public defender engaged in representing an assigned client is a public employee acting in the scope of his or her employment within the meaning of the act, and thus a client who sues such a public defender for malpractice must file, as a precondition to suit, a claim against the employing public agency. (Opinion by Bamattre-Manoukian, J., with Agliano, P. J., and Capaccioli, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 128--Scope--Function of Appellate Court--Rulings on Demurrers--Judgment on Pleadings as Subject to Same Standards of Review:Judgments § 8--On the Pleadings--Reviewed on Same Standards Demurrers.

A demurrer and a motion for judgment on the pleadings are functionally equivalent; each tests the allegations of the complaint, supplemented by any relevant matter of which the trial court can take judicial notice, to determine whether the plaintiff has stated any legally cognizable claim for relief against the defendant. Because the inquiry is purely one of law, on review the appellate court applies the same standards. The question is not whether the plaintiff can prove a legally cognizable claim, but only whether he or she has pleaded one.

(2) Attorneys at Law § 21--Nature and Basis of Malpractice Actions-- Representation in Civil and Criminal Matters.

A private attorney will be liable to a client for his or her malpractice in civil or criminal matters.

(3a, 3b) Judgments § 96--Res Judicata--Collateral Estoppel--Matters Concluded--Adequacy of Public Defenders' Representation in Criminal Reimbursement Proceeding.

In an action for legal malpractice arising from the representation of plaintiff by two public defenders in a murder prosecution, plaintiff was not collaterally estopped to assert that defendants' representation in a proceeding to require him to reimburse the cost of his defense had been inadequate, even though the order in the reimbursement proceeding contained a finding that defendants had "adequately represented [plaintiff] in all proceedings ....” Even assuming that the trial court could and did take notice of the oral reimbursement proceeding, it could not be concluded that the quality of defendants' performance was relevant to, or properly raised or submitted for determination in, that proceeding, or (if so) that the determination extended to all aspects of the several allegations of professional dereliction in plaintiff's complaint.

(4) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues.
Collateral estoppel depends on several preconditions. One is that the issue must have been actually litigated in the previous action, which is to say it must have been properly raised, by the pleadings or otherwise, submitted for determination, and determined. Another is that the issue thus litigated must be identical to the issue to which the estoppel is to apply.

(5a, 5b, 5c, 5d) Government Tort Liability § 29--Actions-- Demurrer--Failure to File Claim With Public Entity Employer Prior to Suing Employee--Public Defenders as Employees.
A salaried full-time public defender engaged in representing an assigned client is a public employee acting in the scope of his or her employment within the meaning of the California Tort Claims Act (Gov. Code, § 810 et seq.), and thus a client who sues such a public defender for malpractice must file, as a precondition to suit, a claim against the employing public agency. Accordingly, in an action for legal malpractice arising from the representation of plaintiff by two public defenders in a murder prosecution, the trial court did not err in sustaining defendants' demurrers and granting their motions for judgment on the pleadings, where the complaint failed to allege that plaintiff filed a claim against the county employer. Defendants could not be considered employees for some purposes and independent contractors for others: such a dual capacity should be found only in the exceptional case where the parties' intentions have been made plain and the functions are clearly defined and separated, and plaintiff pleaded no such clear separation. Further, although defendants were not subject to the county's control, at least insofar as any asserted control might conflict with the client's legitimate interests or with professional standards, the county could and did exercise a degree of control at hiring and by ongoing quality control.
[Public defenders' immunity from liability for malpractice, note, 6 **A.L.R.4th** 774.]
(6) Government Tort Liability § 16--Purpose of Claims Procedure.
The purpose of the claim procedure in the Tort Claims Act (Gov. Code, § 810 et seq.) is to give the public entity an opportunity for early investigation and thus to settle just claims before suit, to defend unjust claims, and to correct conditions or practices that gave rise to the claim.

(7) Public Officers and Employees § 16--Liabilities--Effect of Failure to File Claim With Public Entity Employer Prior to Suing Employee.
In an action against a public employee on the basis of acts or omissions committed within the scope of his or her employment, the failure to allege compliance with the requirement of a claim filed against the public entity employer renders the complaint subject to general demurrer.
[See **Cal.Jur.3d (Rev),** Government Tort Liability, § 107.]
(8) Employer and Employee § 3--Existence of Relationship--Factors Considered.
Although the right to control the means by which the work is accomplished is clearly the most significant test of whether an employment relationship exists, other factors should be considered as well: whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the person is employed; the method of payment,

whether by the time or by the job; whether or not the work is a part of the regular business of the employer; whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business.
[See 2 **Witkin,** Summary of Cal. Law (9th ed. 1987) Agency, § 14.]
(9) Public Defender § 5--Duty to Client.
A public defender assigned to represent a client must consider the client's legitimate interests exclusively and must serve those interests energetically and skillfully, subject only to constraints of professionalism as an officer of the court and a member of the legal profession.

(10) Appellate Review § 161.4--Frivolous Appeal--Sanctions Not Imposed-- Malpractice Action Against Public Defenders--Determination Whether Filing of Tort Claim Required.
On appeal following the sustaining of defendants' demurrers and the granting of their motion for judgment on the pleadings in an action for legal malpractice arising from the representation of plaintiff by defendants, public defenders, in a murder prosecution (plaintiff alleged that defendants' inadequate representation in proceedings to require him to reimburse the costs of his defense led to his being ordered to pay reimbursement), the Court of Appeal declined to impose sanctions for frivolous appeal. The court upheld the trial court's actions on the basis of plaintiff's failure to file a tort claim against the county, defendants' employer, prior to bringing suit; however, plaintiff's contention that defendants were not county employees and that the tort claims requirement was therefore inapplicable was important and its resolution by no means easy. Whether or not plaintiff had consented at one time to reimburse the county was irrelevant to the question of whether the appeal was frivolous.

COUNSEL
Robert J. Filippi and Gordon R. Johnston for Plaintiff and Appellant.
Ralph R. Kuchler, County Counsel, and Albert H. Maldonado, Deputy County Counsel, for Defendants and Respondents. ***609**
BAMATTRE-MANOUKIAN, J.
Billy Leo Briggs sued the Public Defender of Monterey County (Michael Lawrence) and a deputy public defender (Arthur Kaufmann) for attorney malpractice. The defendants' general demurrers and motions for judgment on the pleadings were granted without leave to amend. Briggs appeals from the trial court's order, which we shall treat as an appealable final judgment for defendants. (Cf., e.g., *People* ex rel. *Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 658 [195 Cal.Rptr. 186].) Briggs did not plead that he had filed a claim against Monterey County under the California Tort Claims Act (Gov. Code, § 810 et seq.), and he has acknowledged that he did not file such a claim. The dispositive question is whether he was required to do so. The answer depends on whether Lawrence and Kaufmann, as salaried full-time public defenders engaged in representing an assigned client, were public employees acting in the scope of their employment or, instead, should be regarded as independent contractors: If they were public employees, Briggs was required to file a claim; if they were to be regarded as independent contractors, he was not. We shall conclude that salaried full-time public defenders representing assigned clients are public employees acting in the scope of their employment and therefore that the judgment must be affirmed.

Briggs had been tried for murder and acquitted. Lawrence and Kaufmann had represented Briggs, under court appointment, at trial. After trial the superior court conducted a series of hearings to determine whether Briggs should be required to reimburse any portion of the cost of his defense. (Pen. Code, § 987.8. subds. (b), (e).) Lawrence and Kaufmann appeared at the hearings; Briggs was not otherwise represented. The court ordered Briggs to reimburse the county nearly $73,000 for the services and costs of the public defender's office at trial. Private counsel then entered the case for Briggs and moved to vacate the reimbursement order. On August 14, 1989, the trial court denied the new motion, adding to its order a "special finding that ...

Lawrence, ... [Kaufmann], and the Public Defender's office, ha[ve] adequately represented Mr. Briggs in all proceedings, including these post-trial proceedings."

Ten months later Briggs filed his action against Lawrence and Kaufmann, alleging malpractice in the reimbursement proceedings. The defendants promptly demurred generally, and also moved for judgment on the pleadings, on grounds the complaint did not allege facts sufficient to constitute malpractice, that the August 1989 order collaterally estopped Briggs's malpractice claim, and that the complaint did not allege Briggs had filed a claim against the public entity under the Tort Claims Act. The trial court took ***610** judicial notice of the August 1989 order, sustained the demurrers on the ground "the Complaint fails to state facts to constitute a Cause of Action," and granted the motions for judgment on the pleadings.

(1) The defendants' demurrers and motions for judgment on the pleadings were functionally equivalent: Each tested the allegations of the complaint, supplemented by any relevant matter of which the trial court could take judicial notice, to determine whether Briggs had stated any legally cognizable claim for relief against the defendants. Because the inquiry is purely one of law, on review we apply the same standards. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 954- 955 [237 Cal.Rptr. 738]; *Barker v. Hull* (1987) 191 Cal.App.3d 221, 224 [236 Cal.Rptr. 285]; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99 [214 Cal.Rptr. 561]; cf. *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].) The extensive recitations in the parties' briefs of facts and circumstances neither alleged in the complaint nor subject to judicial notice, and their extensive arguments based on those facts and circumstances, are not relevant to our inquiry. The question before us is not whether Briggs could *prove* a legally cognizable claim, but only whether he has *pleaded* one.

The complaint sufficiently implies that Lawrence and Kaufmann are attorneys and alleges in pertinent part that after the acquittal they represented Briggs at the initial hearing to determine Briggs's "current ability to reimburse the Public Defender for the costs of his defense ...," and that in the reimbursement proceedings they caused Briggs various economic injuries by breaching their professional duties to him in specified ways. Without more these allegations, "liberally construed, with a view to substantial justice between the parties" (Code Civ. Proc., § 452), would arguably suffice to state a cause of action for attorney malpractice against the defendants. (Cf. generally *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1143, 1147 [217 Cal.Rptr. 89]; 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 542, 566, pp. 575-576, 605-606.)

The defendants do not and cannot assert that as public defenders they would be individually immune from liability for malpractice. (2) In California a private attorney will be liable to the client for his or her malpractice in civil or criminal matters. (1 Witkin, Cal. Procedure, *supra,* Attorneys, § 228, pp. 257-258; re liability for malpractice in criminal matters cf. *Holliday v. Jones* (1989) 215 Cal.App.3d 102 [264 Cal.Rptr. 448]; *Martin v. Hall* (1971) 20 Cal.App.3d 414 [97 Cal.Rptr. 730]; Kaus & Mallen, *The Misguiding Hand of Counsel-Reflections on "Criminal Malpractice"* (1974) 21 UCLA L.Rev. 1191.)If (as Briggs asserts) the defendants should be deemed to have acted, at relevant times, as independent contractors paid by ***611** the county but in professional privity with Briggs, then their liability would be essentially that of private attorneys. If (as the defendants themselves assert) the defendants were simply public employees acting in the scope of their employment, that status would not afford them immunity as individuals: Subject to statutory exceptions no party has invoked, in California "a public employee is liable for injury caused by his act or omission to the same extent as a private person." (Gov. Code, § 820, subd. (a).)

The defendants asserted in the trial court, and reiterate here, that the complaint nevertheless fails to state a cause of action against them, because Briggs was collaterally estopped from asserting they had breached their professional duties, and, alternatively, because the complaint contained no allegation of compliance with Tort Claims Act requirements.

The record does not support the defendants' collateral estoppel argument. But because Briggs did not, and cannot, allege that he filed a claim under the Tort Claims Act, his complaint is fatally defective and the judgment must be affirmed.

1. *Collateral Estoppel*

(3a) The collateral-estoppel argument is based on the finding, in the trial court's August 1989 order in the reimbursement proceedings, that the defendants had "adequately represented Mr. Briggs in all proceedings ...." The defendants argue this finding forecloses any assertion by Briggs in *this* proceeding that either defendant's representation in the reimbursement proceeding had *not* been adequate.

The operation of collateral estoppel to avoid unnecessary relitigation of an issue previously resolved is well documented. (7 Witkin, Cal. Procedure, *supra,* Judgment, § 253, pp. 691-692.) (4) The estoppel depends on several preconditions, of which two are significant here: First, the issue must have been actually litigated in the previous action, which is to say it must have been " '*properly raised,* by the pleadings or otherwise, and ... submitted for determination, and ... *determined* ....' " (*People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321], quoting from Rest.2d, Judgments (1982) § 27, com. d, at p. 255, with italics added; cf. *Betyar v. Pierce* (1988) 205 Cal.App.3d 1250, 1254-1255.) Second, the issue thus litigated must be identical to the issue to which the estoppel is to apply. (*People v. Sims, supra,* 32 Cal.3d at pp. 484, 485; 7 Witkin, Cal. Procedure, *supra,* Judgment, § 254, pp. 693-694.)

(3b) On the basis of the showing of record before us, we are not satisfied the August 1989 finding was either litigated in the previous action or ***612** identical to the issue of the defendants' alleged breach of various professional duties in this proceeding. So far as the record reflects, the trial court took judicial notice only of the two-page August 1989 order itself, which falls far short of establishing either precondition. No moving papers or other "pleadings" in the reimbursement proceeding appear in the record. Even were we to assume that the court could and did take notice of the oral proceedings at several hearings (represented in the record only by unauthenticated photocopies of hearing transcripts), we could not conclude that the quality of the defendants' performance in the reimbursement proceeding was relevant to, or properly raised or submitted for determination in, that proceeding, or (if so) that the determination extended to all aspects of the several allegations of professional dereliction in Briggs's complaint in this action.

2. *Claim Requirement*

(5a) Whether Briggs was required to file a Tort Claims Act claim depends on whether, on the facts he pleaded, the defendants were public employees acting in the scope of their employment.

The Tort Claims Act provides that "[a] public entity may ... be sued," but that with specified exceptions "no suit for money or damages may be brought against a public entity ... until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board ...." (Gov. Code, §§ 945, 945.4; cf. *id.* §§ 905, 905.2, 910 et seq.) Where required, the claim must be filed within six months after accrual of the cause of action; leave to file a claim after the six-month deadline must be sought within one year after accrual of the cause of action. (Gov. Code, §§ 911.2, 911.4.)(6) The purpose of the claim procedure is said to be to give the public entity an opportunity for early investigation and thus to settle just claims before suit, to defend unjust claims, and to correct conditions or practices which gave rise to the claim. (Recommendations Relating to Sovereign Immunity, No. 2, Claims, Actions and Judgments Against Public Entities and Public Employees (Jan. 1963) 4 Cal. Law Revision Com. Rep. (1963) pp. 1008-1009; Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 5.6, pp. 435-436.)

Employees of public entities may be sued as individuals (cf. Gov. Code, § 950), and the Tort Claims Act incorporates no requirement that a claim be filed against the *employee.*If the injury on which suit was based arose out of an act or omission within the scope of the employee's employment, the employee may tender defense to, and may thereupon become entitled to indemnification by, the public-entity employer. (Gov. Code, §§ 825-825.6; ***613** Van Alstyne, *supra,* § 5.89, pp. 593-597.) The drafters of the Tort Claims Act perceived that unless some kind of a claim procedure were made a precondition to suit against individual public employees, the protection provided by the requirement of a claim against the *entity* would be "largely negate[d]": "[I]f an action against the public entity were barred because a claim was not presented to the public entity ..., the claimant could, nevertheless, bring an action against the employee involved and recover a judgment which the public entity ordinarily would then be required to pay" without having had the opportunities for early investigation, prompt settlement, adequate defense, and remedial action the claim procedure was intended to provide. (Recommendations Relating to Sovereign Immunity, *supra,* p. 1016.)Accordingly the Legislature included in the Tort Claims Act what amounts to a requirement that (with exceptions not relevant here) one who sues a public employee on the basis of acts or omissions in the scope of the defendant's employment have filed a claim against the *public-entity employer* pursuant to the procedure for claims against public entities. (Gov. Code, §§ 950.2, 950.6, subd. (a), 911.2, 945.4; Van Alstyne, *supra,* §§ 5.63-5.68, pp. 548-556.) (7) Failure to allege compliance renders the complaint in such an action subject to general demurrer. (Van Alstyne, *supra,* §§ 5.8, 5.63, pp. 437-438, 548; *Bohrer v. County of San Diego* (1980) 10 4 Cal.App.3d 155, 160 [163 Cal.Rptr. 419]; *Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal.App.3d 350, 355 [138 Cal.Rptr. 20]; cf. *Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 671 [147 Cal.Rptr. 323].)

The complaint begins with an allegation that Lawrence and Kaufmann "are now and at all times mentioned herein were, duly appointed, employed, and acting as Public Defenders in and for the County of Monterey." The Tort Claims Act defines a public employee, tautologically, as "an employee of a public entity" (Gov. Code, § 811.4); an employee may be "an officer, ... employee, or servant, whether or not compensated ...." (*Id.* § 810.2.) In the common sense of the words it uses, the complaint's first allegation says that the defendants were public employees acting in the scope of their employment. If so, then Briggs was obliged to comply with the claim requirements of the Tort Claims Act and to allege in his complaint that he had done so. He did not allege compliance. Nor did he seek leave to amend his complaint to do so (cf. *Bohrer v. County of San Diego, supra,* 104 Cal.App.3d at p. 160), and at oral argument he acknowledged that in fact he did not file a claim. He argues that under the allegations of the complaint he was not obliged to file a claim.

(5b) Briggs appears to acknowledge that the defendants were employees of Monterey County for some purposes, and does not suggest that the defendants were not, at relevant times, acting within the scope of the duties the county was paying them to perform. His argument, narrowly, is that ***614** notwithstanding the common sense of the first allegation of his complaint it is clear from the complaint as a whole that *in respects relevant to the asserted malpractice* the defendants were acting not as public employees but rather as something akin to independent contractors. The Tort Claims Act expressly excludes independent contractors from its definition of an employee (Gov. Code, § 810.2) and thus of a public employee. (*Id.*§ 811.4.) Briggs relies on the premise that an employer "must have the right to complete control of the manner and method in which the work is performed." He argues that "absolute" control is "an essential characteristic of the employment relationship." Briggs asserts that the actions of a public defender as an attorney representing an assigned client must be guided solely by his or her professional duties to the client, and thus cannot be deemed subject to the public entity's control. (Cf. *In re Hough* (1944) 24 Cal.2d 522, 527-529 [150 P.2d 448].) Briggs would analogize a public defender engaged in such representation to a private attorney appointed from a panel, or engaged by special contract, to represent one or more criminal defendants, and would argue that such private attorneys are independent contractors to whom the claim requirements of the Tort Claims Act would not apply and therefore that the claim requirements should not apply to these defendants.

Briggs's argument encounters two difficulties.

The first is that by suggesting a public defender may be regarded as an employee for some purposes but must be treated as an independent contractor for others, Briggs overtaxes both concepts. The terms have been said to be antithetical (Rest.2d Agency, § 14 N, com. a, p. 80; cf. *id.* § 2, com. b, pp. 13-14; *Automatic Canteen Co. v. State Board of Equalization* (1965) 238 Cal.App.2d 372, 385 [47 Cal.Rptr. 848]): In the several cases that have analyzed the distinction for various purposes, the terms have been contrasted and the question has been whether the person who renders services is an employee *or* an independent contractor. (Cf., e.g., *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946 [88 Cal.Rptr. 175, 471 P.2d 975] [unemployment insurance contributions]; *Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 782-783 [176 Cal.Rptr. 868] [workers' compensation coverage]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 870, 871 [269 Cal.Rptr. 647] [respondeat superior].) The Tort Claims Act itself states the distinction categorically: " 'Employee' includes an officer, judicial officer ..., employee, or servant, whether or not compensated, but does not include an independent contractor." (Gov. Code, § 810.2.)

Any attempt to subdivide what has traditionally been an all-or-nothing inquiry would inevitably tend to create problems of judicial administration. Assuming (upon Briggs's hypothesis) that a salaried public defender is a ***615** county's employee for some purposes but its independent contractor when representing an assigned client, which status would govern the defender's claim for a work-related injury? His or her claim for unemployment benefits following termination? A third party's claim against the county for injuries negligently caused by the defender? Would the answer depend (as Briggs's argument suggests) on the nature of the functions the defender was performing at the time? Such an approach would raise difficult problems of defining and delimiting functions: What of the situation in which the defender injured himself or herself, or negligently injured a third person, while driving from the public defender's office to court, or walking along a courthouse corridor, to meet an assigned client?

It is conceivable that one individual could serve another person or entity as both employee and independent contractor: An example might be a clerical employee who agreed, for a separate consideration, to paint the employer's building on weekends. But for reasons we have suggested such a dual capacity should be found only in the exceptional case where the parties' intentions have been made plain and the functions are clearly defined and separated. No such clear separation has been pleaded here.

Briggs's second difficulty is that he relies too heavily on the factor of *control* of the public defender's representation of a given client.

In the first place Briggs appears to rely exclusively on the control factor: His argument is based on the premise that because the requisite degree of control of the attorney-client relationship was lacking, the defendants could not have been employees of the public entity. (8) Our Supreme Court characterized a similar approach as improper in *Tieberg v. Unemployment Ins. App. Bd., supra,* 2 Cal.3d at page 946, pointing out that although "[t]he right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship" other factors, enumerated in the Restatement Second of Agency, should be considered as well. (*Id.* at p. 950;*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d at p. 874.)

The Restatement defines a "servant" (generally equivalent to an employee) as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [¶] ... In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: [¶] (a) the extent of control which, by the agreement, the master may exercise over the details of the work; [¶] (b) whether or not the one employed is engaged in a distinct occupation or business; [¶] (c) the kind of occupation, ***616** with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [¶] (d) the skill required in the particular occupation; [¶] (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; [¶] (f) the length of time for which the person is employed; [¶] (g) the method of payment, whether by the time or by the job; [¶] (h) whether or not the work is a part of the regular business of the employer; [¶] (i) whether or not the parties believe they are creating the relation of master and servant; and [¶] (j) whether the principal is or is not in business." (Rest.2d Agency, § 220, pp. 485-486; cf. *Tieberg v. Unemployment Ins. App. Bd., supra,* 2 Cal.3d at p. 950, fn. 4;*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d at pp. 874-875.)

(5c) It is clear, from the allegations of the complaint, matters subject to judicial notice, and sound inferences from one or the other, as well as from the parties' statements at oral argument, that the Monterey County Public Defender's office is analogous in relevant respects to similarly denominated offices in other California counties that have chosen to provide representation to indigent criminal defendants by assigning attorneys employed by the county rather than by contracting with private attorneys. Several conclusions relevant to the Restatement factors may be drawn:

(1) The defendants, although inferably licensed as attorneys, were not "engaged in a distinct occupation or business": They devoted their full-time to their duties as public defenders for Monterey County.

(2) The defendants were specialists. Defendant Lawrence was the public defender who presumably worked without supervision; defendant Kaufmann, as a deputy public defender, may have been in some degree supervised by Lawrence or by other attorneys in the office but would not have been supervised by county employees outside the public defender's office.

(3) The occupation obviously requires skill.

(4) Although "the factor of ownership of tools is of little importance where the service to be performed is an intellectual endeavor" (*Tieberg v. Unemployment Ins. App. Bd., supra,* 2 Cal.3d 943, 954), such instrumentalities, tools, and workplaces (including even the courtrooms and jail visiting areas) as were necessary to the defendants' functions were provided by the county.

(5) The defendants were employed at the pleasure of the county, subject to termination on reasonable notice for performance deemed unsatisfactory. ***617**

(6) The defendants received salaries, calculated on the basis of time on the job and without reference to particular cases or clients and paid at regular inter-

vals.

(7) The work of public defenders, in discharge of the public's constitutional duty to provide competent legal representation to indigent criminal defendants, is unquestionably part of the regular business of the county.

(8) The county and the defendants believed they were creating an employment relationship with many of its normal indicia: Exclusive right to the employee's service, reasonably regular work hours, provision of office space and facilities and clerical support, a range of employee benefits and perquisites.

(9) The county is unquestionably in business, albeit of a special kind, and as noted the provision of public defense services to indigent criminal defendants is a necessary part of that business.

The preponderance of these factors suggests an employment relationship. But many of them are simply special indicators of control (cf. *Tieberg v. Unemployment Ins. App. Bd., supra,* 2 Cal.3d at p. 953), and all may be regarded as secondary to the control factor itself. (Cf. *id.* at p. 950;*Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 39 [180 P.2d 11].)

Briggs's approach to the control factor itself is, we believe, both too narrow and too rigid.

(9) It cannot be questioned that a public defender assigned to represent a client must consider the client's legitimate interests exclusively and must serve those interests energetically and skillfully, subject only to constraints of professionalism as an officer of the court and a member of the legal profession. (5d) Within this narrow perspective it is no doubt true that the public defender is not subject to the county's control, at least insofar as any asserted control might conflict with the client's legitimate interests or with professional standards. But in a somewhat broader perspective devotion to the client's interests, energy, skill, and professionalism are exactly what the public defender has been employed to provide: The county in its own interest should insist on no less, and should be prepared to discipline or to discharge a public defender who does not meet these standards. In this broader perspective the county does exercise control over the public defender's representation of clients. As relevant to this case, it cannot be suggested that the county has no proper interest in, and cannot act to prevent, malpractice ***618** by individual public defenders: The county can and should exercise a degree of control at hiring and by ongoing quality control to assure that its public defenders are providing competent and professional services.

Further, Briggs's insistence that the employment relationship requires "complete" or "absolute" control is far too rigid. Read together, the cases on which Briggs relies establish no more than that "complete" or "absolute" control will support a finding of an employment relationship. The cases do not support the proposition, essential to Briggs's position as he has stated it, that lack of complete or absolute control means there is *not* an employment relationship. To the contrary, "[i]t does not follow that because there is a certain amount of freedom inherent in the nature of the work one is called upon to do that one becomes an independent contractor rather than an employee. [Citation.]" (*Greenaway v. Workmen's Comp. App. Bd.* (1969) 269 Cal.App.2d 49, 54- 55 [74 Cal.Rptr. 452] [inheritance tax referee a county employee for workers' compensation purposes].)

We hold that a salaried full-time public defender engaged in representing an assigned client is a public employee acting in the scope of his or her employment within the meaning of the California Tort Claims Act. Our holding will require that a client who sues such a public defender for malpractice file, as a precondition to suit, a Tort Claims Act claim against the employing public agency. When filed, such a claim will serve the remedial purpose of the claim procedure by giving the entity prompt notice of its employee's asserted failure to provide competent and professional service.

We are aware that arguments similar to Briggs's have been persuasive to appellate courts in several other jurisdictions. (*White v. Galvin* (Ind. Ct. App. 1988) 524 N.E.2d 802, 803-804; *Windsor v. Gibson* (Fla. Dist. Ct. App. 1982) 424 So.2d 888, 889-890; *Reese v. Danforth* (1979) 486 Pa. 479, 484-486 [406 A.2d 735, 738-739; 6 A.L.R.4th 758, 762-764]; *Spring v. Constantino* (1975) 168 Conn. 563, 568-576 [362 A.2d 871, 875-879,6 A.L.R.4th 758]; cf. Annot., Public Defender's Immunity From Liability for Malpractice (1981) 6 A.L.R.4th 774; Millich, *Public Defender Malpractice Liability in California* (1989) 11 Whittier L.Rev. 535, 536-537.)The question before the Indiana Court of Appeals in *White v. Galvin, supra,* was analogous to that before us, and the court concluded that the deputy public defender was not a county employee and therefore that notice to the county was not a precondition to suit against the defender personally. We respectfully disagree with the analysis of the majority, and find ourselves in agreement with the substance of the dissent, in *White v. Galvin.*In each of the remaining cases the practical issue, under local law, was whether the publicly compensated defense attorney was or was not to be wholly immune from liability for ***619** asserted malpractice, and a determination that he or she was acting within the scope of employment as a public employee would have invoked immunity and left the client with no recourse. Our situation is different: In any event these defendants, as individuals, would not be immune from liability for malpractice. Here the practical issue has little or nothing to do with Briggs: It is whether the defendants may look to the public entity for defense and for indemnification. (Gov. Code, § 825; Millich, *supra,*11 Whittier L.Rev. 535, 539-542.)

From our holding that a salaried public defender engaged in representing an assigned client is a public employee acting in the scope of his or her employment it follows that Briggs was required to file a claim against Monterey County, that his failure to allege he had done so rendered his complaint demurrable, and that his acknowledgment that he has not filed a claim (time to do so having expired) ratifies the trial court's denial of leave to amend the complaint once it had sustained the defendants' demurrer.

3. *Sanctions*

(10) In their brief the defendants have asserted that Briggs's appeal was frivolous and that they should be awarded, as sanctions, the full costs of the services of the county counsel for representing them in this court.

Much of the defendants' argument appears directed to Briggs's assertion, underlying his unsuccessful motion to set aside the trial court's reimbursement order and necessarily implicit in his malpractice action, that he should not have been ordered to reimburse the county for the cost of his defense. The defendants argue that Briggs at one time consented to reimburse the county.

If the defendants are right, they must pursue whatever remedy they may have in some other proceeding. Our inherent power, codified in Code of Civil Procedure section 907, to protect the integrity of our procedures by imposing sanctions for flagrant misuse of them, is limited to a consideration whether the pending *appeal* "was frivolous or taken solely for delay ...." The appeal, as distinct from the underlying dispute, was addressed to a narrow procedural ruling. That Briggs has not prevailed in this court by no means establishes that his appeal was frivolous or dilatory. The pivotal issue he presented was important and (as the decisions contrary to ours in other jurisdictions may suggest) by no means easy. We cannot regard the appeal as frivolous. ***620**

The judgment is affirmed. The defendants' application for sanctions on appeal is denied. The defendants shall recover their ordinary costs on appeal.

Agliano, P. J., and Capaccioli, J., concurred. ***621**

Cal.App.6.Dist.
Briggs v. Lawrence
230 Cal.App.3d 605, 281 Cal.Rptr. 578

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EXHIBIT 5

Court of Appeal, Fourth District, Division 2, California.
CORONA-NORCO UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant,
v.
CITY OF CORONA, et al., Defendants and Respondents.
Joseph DE LEO, Jr. Real Party in Interest and Respondent.
No. E011748.

Aug. 5, 1993.
Review Denied Oct. 28, 1993.

School district filed petition for writ of mandate challenging city's approval of zoning change for residential project. The Superior Court, Riverside County, No. 215062, Ronald T. Deissler, J., entered judgment in favor of city, and district appealed. The Court of Appeal, Dabney, J., held that: (1) district failed to carry its burden of showing that city's action was inconsistent with general plan, and (2) district had failed to exhaust its administrative remedies so as to preserve challenge under California Environmental Quality Act (CEQA).

Affirmed.

West Headnotes

[1] **Zoning and Planning 604**
414k604Most Cited Cases
Enactment of zoning ordinance is quasi-legislative decision, and courts defer to local entities' determination that zone change is consistent with applicable general plan unless, based upon evidence before city council, reasonable person could not have reached same conclusion.

[2] **Mandamus 69**
250k69Most Cited Cases
Review of local entities' legislative determinations is by ordinary mandamus under Code of Civil Procedure; such review is limited to inquiry into whether action was arbitrary, capricious, or entirely lacking in evidentiary support. West's Ann.Cal.C.C.P. § 1085.

[3] **Zoning and Planning 562**
414k562Most Cited Cases
Exhaustion of administrative remedies is jurisdictional prerequisite to judicial action to challenge land use planning decision.

[4] **Zoning and Planning 562**
414k562Most Cited Cases
School district was not precluded from challenging city's approval of zoning change for residential project by its failure to exhaust administrative remedies before filing writ petition where city council had not issued statutorily required notice in advance of meeting that failure to raise issues would preclude judicial review. West's Ann.Cal.Gov.Code § 65009(b), (b)(1).

[5] **Zoning and Planning 30**
414k30Most Cited Cases
Under "consistency doctrine," local governments must maintain their zoning in manner consistent with their general plans; every zoning action must be consistent with plan, and zoning ordinance that is inconsistent with general plan at time it is enacted is invalid when passed. West's Ann.Cal.Gov.Code §§ 65860, 65860(a).

[6] **Zoning and Planning 167.1**
414k167.1Most Cited Cases
School district which sought to challenge city's approval of zone change for residential project, on ground that change was inconsistent with city's general plan, failed to carry its burden of demonstrating that city's action was arbitrary, capricious, or entirely lacking in evidentiary support where city's general plan was not so specific as to preclude zoning change, and district's objections were only general in nature and contained no data or actual evidence of impact of zoning change on schools that served area in question. West's Ann.Cal.Gov.Code §§ 65860, 65860(a).

[7] **Administrative Law and Procedure 229**
15Ak229Most Cited Cases

[7] **Environmental Law 665**
149Ek665Most Cited Cases
(Formerly 199k25.15(3.1) Health and Environment)
Parties are required to exhaust their administrative remedies before bringing legal challenges under California Environmental Quality Act (CEQA). West's Ann.Cal.Pub.Res.Code §§ 21177, 21177(b).

[8] **Administrative Law and Procedure 229**
15Ak229Most Cited Cases

[8] **Environmental Law 665**
149Ek665Most Cited Cases
(Formerly 199k25.15(3.1) Health and Environment)
School district failed to exhaust its administrative remedies, so as to preserve its California Environmental Quality Act (CEQA) challenge to city's approval of zoning change for residential project, where district failed to comment or respond after notice of preparation of initial study for project, district failed to appear at public meeting at which planning commission considered proposed mitigated negative declaration, and district's letters to city council, requesting that condition be imposed on project, did not raise any specific challenge to CEQA procedures or findings. West's Ann.Cal.Pub.Res.Code §§ 21177, 21177(b).

****804*988** Parker, Covert & Chidester, Clayton H. Parker, Spencer E. Covert and Jonathan J. Mott, Tustin, for plaintiff and appellant.

Best, Best & Krieger, Barton C. Gaut, Dallas Holmes and Brant H. Dveirin, Riverside, for defendants and respondents.

Clayson, Mann, Arend & Yaeger and David R. Saunders, Corona, for real party in interest and respondent.

***989** OPINION

DABNEY, Associate Justice.

Petitioner Corona-Norco Unified School District (District) filed a petition for writ of mandate against the City of Corona and its City Council (collectively, City). The petition challenged the City's approval of a zone change for a residential project on the grounds that: (1) the zone change was inconsistent with the City's general plan (General Plan); and (2) the City had failed to conduct an adequate review of the project under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The trial court concluded the zone change did not violate the requirement of consistency with the General Plan and found the District had failed to exhaust its administrative remedies as to its CEQA claims. The trial court entered judgment in favor of the City. In its appeal from the judgment, the District repeats its consistency and CEQA challenges.

FACTS

The Parties. The District is the public school district responsible for providing public education and school facilities in Corona and adjacent areas.

The City is the local governmental entity charged with the planning and zoning of residential, commercial, and industrial development in Corona. The City has adopted a general plan for local development.

Real party in interest Joseph DeLeo, Jr., is the developer of the property for which the City approved a zone change.

The Zone Change. DeLeo submitted an application to the City for a change of zone for 105.5 acres of land in an area that was then unincorporated. [FN1] The City designated the proposal Zone Change 90-22. The application requested changing the zone to R-1-20 (single family residential with a 20,000 square feet minimum lot area).

> FN1. Annexation proceedings have since taken place. The District does not challenge the annexation.

The City's planning commission held public hearings on the application on October 23, 1990, after publishing notice of the hearing on October 2, 1990. The City's staff conducted an initial study of the project under CEQA. The study "identified potentially significant effects on the environmental ***990**[*sic*]" but concluded that "revisions in the project plans or proposals made by or agreed to by the applicant would avoid the effects, or mitigate the effects to a point where clearly no significant effects would occur." The staff recommended adoption of a mitigated negative declaration. The environmental checklist prepared for the project asked if the proposal would have an effect upon or result in a need for new governmental services. The box next to schools was checked "no."

****805** The City's community development department recommended that the City approve the application. The department's report stated, "The proposed change of zone is in conformity with the general plan map and report for the following reason: [¶] a). The General Plan land use designation of low density residential permits a density range of 0-6 dwelling units per acre. The proposed pre-zone permits a maximum of two dwelling units per acre which is within the permitted density range."

On January 24, 1991, the City clerk issued a notice of public hearing to be held on February 20, 1991. The notice announced that the City council would consider the planning commission's recommendations for approval of the application for zone change and for a mitigated negative declaration for the project. At the meeting on February 20, 1991, the City council approved the zone change and instructed the City attorney to prepare the appropriate ordinance. The District did not appear at the hearing.

On September 18, 1991, and September 26, 1991, the District sent letters to the City council requesting that the following condition be imposed on the project: " 'Pursuant to the requirement of the General Plan of this city, developer must receive a certification from the Corona-Norco Unified School District that the school district has adequate capacity for grades Kindergarten through grade 12 to provide schools for the students to be residing within this development. For this certification, developer shall agree to be part of the Community Facilities District providing construction funds on a per dwelling unit basis to be utilized by the school district for capital outlay purposes or developer shall enter into any other financial transaction where adequate schools will be provided to the satisfaction of the Board of Education of Corona-Norco Unified School District.' "

On September 25, 1991, the City published notice that it was considering adopting an ordinance to change the zone for the project at its October 2, 1991, meeting. At that meeting, counsel for the District requested that the condition set forth in the District's letters be included as a condition of approval of the project. The City council adopted Ordinance No. 2072 approving the zone change and also adopted a mitigated negative declaration ***991** for the project. The City council did not adopt the District's proposed condition.

Mandate Proceeding. The District filed a petition for writ of mandate challenging the City's approval of the zone change. The District contended the zone change was inconsistent with the General Plan and had been approved in violation of CEQA requirements because the impact on schools of a large residential project was not considered or mitigated.

In the petition, the District alleged that its educational facilities were seriously overcrowded; it was using year-round schooling and portable classrooms to make maximum use of its facilities; it was unable to mitigate the adverse effects of the overcrowding; development under the zone change would have an adverse effect on the District's already inadequate and overcrowded facilities; the zone change would result in hundreds of new students requiring new classrooms and other support facilities; the District lacked financial means to mitigate the impact of new development on its facilities; state law limited the amount of developer fees the District could impose on new development projects to $1.58 per square foot of new construction; the District's estimate of the impact of new residential construction on its facilities was $15,036 per dwelling unit; state funding for new school construction was presently nonexistent; no alternative funding mechanisms were in place; and the District had no authority to use alternative funding mechanisms without the cooperation of developers and property owners. The District further alleged that the zone change "fail[ed] to incorporate sufficient terms and conditions to assure that adequate school facilities [would] be provided [and] ... falsely assume[d] that developer fees alone [would] mitigate the school impacts."

In the second cause of action, the District alleged that the City violated CEQA ****806** requirements in approving the zoning change. The District alleged that the City: (1) failed to describe adequately the significant environmental effects of the zone change; (2) failed to address the cumulative impact of this and other closely related and reasonably foreseeable future projects; (3) failed to describe feasible mitigation measures to minimize the impact of the proposed project on school facilities and services; (4) failed to consider alternatives to lessen the adverse impacts; (5) failed to respond to written and oral comments; and (6) adopted findings not supported by the record.

The City and DeLeo opposed the petition on the ground the zone change was consistent with the General Plan, and the General Plan did not require ***992** the City to impose additional funding under the terms demanded by the District. The City and DeLeo also asserted the District had failed to exhaust its administrative remedies under CEQA and failed to participate in the approval process and in public hearings.

The court denied the petition on the grounds the zone change was consistent with the General Plan, [FN2] and the General Plan did not require denial or additional funding for schools. The court ruled the CEQA challenge was barred by the District's failure to exhaust administrative remedies. [FN3]

FN2. In its statement of decision, the trial court stated, "It does not appear that the subject zone change is inconsistent with respondent City's General Plan. Petitioner attempts to use general policy statements and goals to argue that General Plan 'requirements' were not complied with. Petitioner fails to point to any specific provisions prohibiting the subject zone change, and it cannot be said that the City's determination was arbitrary or capricious."

FN3. In its statement of decision, the trial court stated, "With respect to the petitioner's CEQA objections, petitioner correctly points out that the City's determination in the initial study that the project will have no significant impacts upon schools is a mere conclusion not adequately supported by data in the record. (*See Citizens Assoc. etc. [sic] v. County of Inyo,* 172 Cal.App.3d 151, 217 Cal.Rptr. 893.) However, the court reluctantly finds that petitioner has failed to exhaust its administrative remedies as required by Pub. Res. C. § 21177." The court noted that in its letters, "petitioner did not raise any of the CEQA issues it now raises in this action. Generalized statements of environmental concern are not sufficient. (*See Coalition for StudentAction v. City of Fullerton* [1984] 153 Cal.App.3d 1194, 200 Cal.Rptr. 855.)"

DISCUSSION

I. *Consistency Challenge*

[1][2] A. *Standard of Review.* The enactment of a zoning ordinance is a quasi-legislative decision. (*Mitchell v. County of Orange* (1985) 165 Cal.App.3d 1185, 1191-1192, 211 Cal.Rptr. 563;*Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 799, 161 Cal.Rptr. 260.) Courts defer to a local entity's determination that a zone change is consistent with the applicable general plan unless "based on the evidence before [the] City Council, a reasonable person could not have reached the same conclusion. [Citations.]" (*No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243, 242 Cal.Rptr. 37; see also *Carty v. City of Ojai* (1978) 77 Cal.App.3d 329, 333, fn. 1,143 Cal.Rptr. 506.) Review of local entities' legislative determinations is by ordinary mandamus under Code of Civil Procedure section 1085. Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support. (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 305, 223 Cal.Rptr. 18.)

***993** Legislative enactments are presumed to be valid, and to overcome the presumption of validity, the petitioner must produce evidence "compelling the conclusion that the ordinance is, as a matter of law, unreasonable and invalid. [Citations.] There is also a presumption that the board ascertained the existence of necessary facts to support its action, and that the 'necessary facts' are those required by the applicable standards which guided the board. [Citations.]" (*Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 775, 90 Cal.Rptr. 88.)

[3] B. *Exhaustion of Administrative Remedies.* The City and DeLeo argue that the District failed to

preserve the consistency ****807** issue for appeal because the District did not exhaust its administrative remedies before filing the writ petition. (See Gov.Code, § 65009, subd. (b)(1); [FN4]*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197, 200 Cal.Rptr. 855.) Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial action to challenge a planning decision. (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 859, 226 Cal.Rptr. 575.)

> FN4.Government Code section 65009, subdivision (b) states, "(1) In an action or proceeding to attack, review, set aside, void or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:
> "(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.
> "(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.
> "(2) *If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: 'If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing.*' " (Emphasis added.)

[4] The public notice of the February 20, 1991, hearing which the City caused to be published in the local newspaper did *not* include the warning specified in Government Code section 65009, subdivision (b)(2). Therefore, the City is precluded from objecting to issues raised by the District after the February 20, 1991, public hearing. The exhaustion requirement of Government Code section 65009, subdivision (b)(1) does not apply. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 740- 741, 270 Cal.Rptr. 650.)

***994** C. *Finding of Consistency.* The District argues that the zone change was inconsistent with the City's General Plan.

The consistency doctrine has been described as "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1213, 217 Cal.Rptr. 790.) Land use decisions, including zoning changes, of general law cities must be consistent with the general plan. (Gov.Code, § 65860, subd. (a); [FN5]*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536, 277 Cal.Rptr. 1, 802 P.2d 317.)

> FN5. "(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if:
> "(i) The city or county has officially adopted such a plan, and
> "(ii) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan." (Govt.Code, § 65860.)

[5] The zoning consistency requirement requires local governments to maintain their zoning in a manner consistent with their general plans. Every zoning action must be consistent with the plan, and a zoning ordinance that is inconsistent with the general plan at the time it is enacted is "invalid when passed." (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, 179 Cal.Rptr. 261.)

"An action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." (General Plan Guidelines, p. 212, Governor's Office of Planning and Research, 1990.) [FN6]

> FN6. The General Plan Guidelines are

advisory only, but they assist in determining compliance with general plan laws. (*Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 702, 188 Cal.Rptr. 233;*Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 886, 170 Cal.Rptr. 342.)

[6] The District cites three recent cases for the proposition that the zone change was inconsistent with the general plan. ****808**(*Murrieta Valley Unified School Dist. v.* http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1991063297*County of Riverside* (1991) 228 Cal.App.3d 1212, 279Cal.Rptr. 421;*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 277 Cal.Rptr. 645;*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 252 Cal.Rptr. 825.)

***995** In *Mira,* a developer unsuccessfully sought rezoning from single-family to multiple-family residential. The developer contended the project was consistent with the general plan because it was consistent with the land-use designation in the general plan. The court nonetheless found the city did not abuse its discretion in denying the proposed zoning "on the basis that the proposed multifamily development would outstrip the provision of needed public services and improvements in the area, *a concern included within the community and general plans.*" (*Mira Development Corp. v. City of San Diego, supra,* 205 Cal.App.3d at pp. 1204-1205, 252 Cal.Rptr. 825, emphasis added.)

In *Mira,* the applicable community plan provided that development should proceed only if adequate public facilities were assured. Another applicable local policy addressed school overcrowding and requested information from the school district to facilitate development decisions. "The community plan generally proposes to monitor development in relation to the availability of public services, and to that end states building permit issuance should be monitored to prevent premature and uncoordinated development. [¶] More specifically, regarding housing, the community plan states it seeks to develop sufficient housing to accommodate expected increases in population at an appropriate density to avoid overtaxing public facilities.... Regarding schools, the community plan proposes to expand school programs to accommodate the needs of all age groups." (*Mira Development Corp. v. City of San Diego, supra,* 205 Cal.App.3d at p. 1212, 252 Cal.Rptr. 825.)

Mira does not stand for the proposition that a zone change *must* be denied because of an impact on a local school district. Rather, the court decided that on the facts and circumstances before it, the local governing body *did not abuse its discretion* in denying an application for zone change.

In *William S. Hart Union High School Dist.,* the court stated that the limits on school mitigation fees under Government Code sections 65995 and 65996 did not prohibit a local entity from complying with otherwise applicable mandatory standards in its general plan requiring adequate infrastructure. Those standards were set forth in a development monitoring system (DMS) which set forth specific mandatory guidelines which must be followed for the county to approve development projects. (*William S. Hart Union High School Dist. v. Regional Planning Com., supra,* 226 Cal.App.3d at p. 1616, 277 Cal.Rptr. 645.) Specifically, the planning commission and board were "required (by the general plan and the DMS) to deny approval of a development project if mitigation measures [were] not sufficient to overcome the adverse impact on school facilities that a proposed development [would] bring." (*Id.,* at p. 1618, 277 Cal.Rptr. 645, emphasis omitted.) The planning commission had acknowledged in its ***996** DMS reports that the "school classroom supply was not adequate and that there was a potential significant impact on the school district from the proposed development." (*Id.,* at p. 1617, 277 Cal.Rptr. 645.) Here, the General Plan did not contain specific mandatory guidelines similar to those in *William S. Hart Union High School Dist.*

In *Murrieta Valley Unified School Dist.,* the court ruled that when the applicable general plan required a local agency to incorporate nonmonetary school mitigation measures, the requirement of internal consistency required the adoption of such measures in a general plan amendment. The general plan in that case contained a specific public facilities and services element. [FN7]****809**(*Murrieta Valley Unified School* http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1991063297*Dist. v. County of Riverside, supra,* 228 Cal.App.3d at p. 1235, 279 Cal.Rptr. 421.) Here, the General Plan requires no similar mitigation measures and contains no public facilities and services element. [FN8]

FN7. The Public Facilities and Services Element stated, " ' "[W]hen school districts adopt impaction and statements, the County will coordinate with the districts to develop appropriate financing mechanisms for school facilities." ' " In addition, " 'if land use proposals will impact schools, "they must arrange with the school districts to assist in providing adequate school facilities." ' " (*Murrieta Valley Unified School Dist. v. County of Riverside, supra,* 228 Cal.App.3d at p. 1235, 279 Cal.Rptr. 421.)

FN8. Here, the District contends the zone change was inconsistent with various goals and objectives of the General Plan. The District points out that the land use element of the General Plan includes the following goals and objectives, among others:
"To insure that developing areas are properly served with essential services, utilities and facilities."
"To phase the extension of public services to promote an orderly pattern of development."
"To distribute the cost of new public facilities and services to those generating the needs for additional municipal services."
"To require the master planning of infrastructure systems in major new development areas."
"To provide funding mechanisms which equitably share the costs of infrastructure systems in major new development areas among the beneficiaries of development."
"To insure that major new development areas are self-supporting and will not cause an unacceptable loss of service levels in the developed portions of the City."
With respect to schools, the General Plan states, "The recommended method for coordination is a District Sign-Off or Certification Sheet that will indicate the adequacy of school operating capacity and other public services prior to City Council approval of a final tract map."
The General Plan states, "Public facilities include the civic center area, existing schools and proposed school sites, hospital sites, Corona Municipal Airport and other public service and institution facilities in the Planning Area."

In summary, the General Plan is not as specific as those in the cases on which the District relies and does not contain mandatory provisions similar to the ones in those cases. Moreover, the District's letters to the City contain only general objections on legal grounds and contain no data or actual evidence of the impact of the zone change on the schools that serve the area of the zone change. The District has failed to carry its burden of showing ***997** that the City's action was arbitrary, capricious, or entirely lacking in evidentiary support. (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles, supra,* 177 Cal.App.3d at p. 305, 223 Cal.Rptr. 18.)

II. *CEQA Challenge*

A. *Standard of Review.* Public Resources Code section 21168 provides, "Any action or proceeding to attack, review, set aside, void, or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure. [¶] In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in light of the whole record."

[7] B. *Exhaustion of Administrative Remedies.* The City contends that the District failed to exhaust its administrative remedies, and its CEQA challenge is therefore barred. Parties are required to exhaust their administrative remedies before bringing legal challenges under CEQA. (Pub.Res.Code, § 21177; [FN9]*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198, 200

Cal.Rptr. 855.) The reason for this rule is that the decision-making body "is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief ... the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so.' [Citations.]" (*Citizens Assn. for Sensible Development of Bishop Areav. County of Inyo* (1985) 172 Cal.App.3d 151, 162-163, 217 Cal.Rptr. 893.)

FN9.Public Resources Code section 21177, subdivision (b) states, "No person shall maintain an action unless that person objected to the approval of the project orally or in writing."

In *Coalition for Student Action*, the court stated that raising general environmental criticisms at public hearings was not sufficient to exhaust administrative remedies. The court explained, "It is difficult ****810** to imagine any derogatory statement about a land use project which does not implicate the environment somehow." (*Coalition for Student Action v. City of Fullerton, supra,* 153 Cal.App.3d at p. 1197, 200 Cal.Rptr. 855.)

The trial court found that the District had been given actual notice of the preparation of the initial study for the project in August 1990. ***998** However, the District failed to comment or respond then or after the proposed mitigated negative declaration was prepared and circulated for public review and comment. The District also failed to appear at the public meeting on January 22, 1991, at which the planning commission considered the negative declaration.

[8] On appeal, the District contends that under CEQA: (1) the initial study for the project was inadequate; (2) the City's findings were factually erroneous; (3) the findings were not supported by substantial evidence; and (4) the City did not prepare an environmental impact report or adopt a mitigated negative declaration. The District argues that its September 18 and September 26, 1991, letters adequately raised the District's environmental concerns.

Those letters asserted that the District's proposed condition was required for the zone change to be consistent with the General Plan. The letters set forth the provisions of the general plan on which the District relied and discussed cases supporting the District's position that the City was required to reject any development project that did not comply with the General Plan. The letters also addressed the reasons the permissible development fees were inadequate to meet the District's facility needs.

The District's letters expressed the District's opposition to the zoning change based on inconsistency with the General Plan, but the letters but did not raise any specific challenge to the CEQA procedures or findings. "Mere objections to the *project,* as opposed to the procedure, are not sufficient to alert an agency to an objection based on CEQA." (*Coalition for Student Action v. City of Fullerton, supra,* 153 Cal.App.3d at p. 1198, 200 Cal.Rptr. 855.)

We conclude the trial court properly ruled that the District had failed to exhaust its administrative remedies so as to preserve the CEQA challenge.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

RAMIREZ, P.J., and McKINSTER, J., concur.

17 Cal.App.4th 985, 21 Cal.Rptr.2d 803, 84 Ed. Law Rep. 399

END OF DOCUMENT

EXHIBIT 6

deBottari v. Norco City Council (Hanzlik)
Cal.App. 4 Dist.,1985.

Court of Appeal, Fourth District, Division 2, California.
Louis A. deBOTTARI, Plaintiff and Appellant,
v.
NORCO CITY COUNCIL, Norco City Clerk, Defendants and Respondents;
Howard HANZLIK Real Party in Interest.
E001608.

Sept. 6, 1985.
As Modified Sept. 24, 1985.
Review Denied December 19, 1985.

Following city council's refusal to submit properly certified referendum petition to voters on ground that repeal of challenge to zoning ordinances would result in a legally invalid zoning scheme, voter filed petition for writ of mandate seeking an order commanding the council either to repeal the ordinances or place the issue before city electors. The Superior Court, Riverside County, J. David Hennigan, J., denied the petition, and voter appealed. The Court of Appeal, Rickles, J., held that: (1) in response to the petition, council had mandatory duty either to repeal challenged ordinances or to submit them to referendum unless directed to do otherwise by court on compelling showing that proper case had been established for interfering with the referendum power, and (2) council established "compelling showing" necessary to justify preelection judicial interference with that power.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚷191

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k191 k. In General. Most Cited Cases

In response to properly certified referendum petition, city council had mandatory duty either to repeal challenged zoning ordinances or to submit them to referendum unless directed to do otherwise by court on compelling showing that proper case had been established for interfering with the referendum power. West's Ann.Cal.Elec.Code § 4055.

[2] Zoning and Planning 414 ⚷30

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k30 k. Comprehensive Plan. Most Cited Cases

A zoning ordinance inconsistent with the general plan at time of its enactment is invalid when passed. West's Ann.Cal.Gov.Code § 65860(a).

[3] Municipal Corporations 268 ⚷63.15(3)

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k63 Judicial Supervision
268k63.15 Particular Powers and Functions
268k63.15(3) k. Police Power and Regulations. Most Cited Cases
(Formerly 268k63.1(6))

City council established "compelling showing" necessary to justify preelection judicial interference with referendum power, where referendum, if successful, would have enacted a clearly invalid zoning ordinance. West's Ann.Cal.Gov.Code § 65860(a).

[4] Zoning and Planning 414 ⚷21

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k21 k. Validity of Regulations in General. Most Cited Cases

Requirement of consistency is linchpin of California's land use and development laws.

****791 *1206** Louis A. deBottari, in pro. per.
John K. Van de Kamp, Atty. Gen., Andrea Sheridan Ordin, Chief Asst. Atty. Gen., Theodora Berger, Asst. Atty. Gen. ***1207** and David W. Hamilton, Deputy Atty. Gen., as amicus curiae on behalf of Louis A. deBottari, plaintiff and appellant.
Maroney, Brandt & Holdaway and Barry Brandt, Upland, for defendant and respondents Norco City Council and Norco City Clerk.
Charles H. Carter, Corona, and Marc Levine, Norco, for real party in interest Howard Hanzlik.

OPINION

RICKLES, Associate Justice.
Defendant Norco City Council (council) refused to submit a properly certified referendum petition to the voters on the ground that repeal of the challenged ordinances would result in a legally invalid zoning scheme. Plaintiff Louis A. deBottari, a resident and qualified voter of Norco, filed a petition for writ of mandate in the Superior Court of Riverside County to command the defendant either to repeal the ordinances or place the issue before the electors of Norco. The trial court entered judgment denying the petition for writ of mandate. Plaintiff filed a notice of appeal. The Attorney General appears as amicus curiae on behalf of plaintiff.

Considered together, the contentions of plaintiff and the Attorney General (hereinafter referred to jointly as "plaintiff") are (1) that council had a mandatory duty either to repeal the ordinances or submit the issue to the voters, and (2) that council has failed to establish the "compelling showing" necessary to justify pre-election judicial interference.

FACTS

Howard Hanzlik (real party in interest) applied for a general plan amendment and zone change for certain property located in the City of Norco. The general plan amendment was requested for a parcel of property approximately 30 to 40 acres in size, and sought to change the land use designation from Residential/Agricultural (0-2 units per acre) to Residential-Low Density (3-4 units per acre).

Mr. Hanzlik also requested that the same property be rezoned from "R-1-18" to "R-1-10." The object of the general plan amendment and zone change was to allow construction of single family homes on 10,000 square-foot lots (approximately 4 per acre); the existing zoning for the property ****792** required a minimum of 18,000 square feet for each lot (approximately 2 units per acre).

***1208** On June 20, 1984, the council approved the general plan amendment requested by Mr. Hanzlik. Two weeks later, on July 5, 1984, the council adopted Ordinance Nos. 517 and 518 which approved the requested zone changes.

Following the council's July 5 action, plaintiff and other qualified voters and residents of Norco prepared and circulated petitions protesting the enactment of the two rezoning ordinances and calling for their repeal or, alternatively, a referendum. The petitions were submitted in a timely fashion to the city clerk (see Elec.Code, § 4051), who examined the petitions and certified they were in proper form and contained the requisite number of signatures of registered Norco voters. (See Elec.Code, §§ 4051, 4053-4054.)

The referendum petitions were then presented to the council pursuant to Elections Code section 4055, which provides that the legislative body of a city must either repeal the challenged ordinances or submit the referendum to the voters. After obtaining advice from the city attorney, the council refused to do either on the grounds that repeal of the ordinances would result in the subject property being zoned inconsistently with the amended general plan, contrary to Government Code section 65860, subdivision (a).

Plaintiff's petition for a writ of mandate to compel the council either to repeal the ordinance or submit the issue to the voters was denied and this appeal followed.

DISCUSSION

I

Pre-Election Non-Judicial Review

Plaintiff first contends that the council violated its mandatory duty under Elections Code section 4055 by failing either to repeal the zoning amendment at issue or submit the referendum to the voters. This section in pertinent part provides: "If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters...."

There appears to be no case which has addressed the question whether a city council retains discretion under Elections Code section 4055 to refuse to place on the ballot a duly certified referendum petition. However, many courts have construed similar election statutes to hold that a city clerk (*Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 104 Cal.Rptr. 793; Elec.Code, ***1209** § 4008); a city registrar of voters (*Farley v. Healey* (1967) 67 Cal.2d 325, 62 Cal.Rptr. 26, 431 P.2d 650 [charter of the City & County of San Francisco § 180]); a county clerk (*Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 101 Cal.Rptr. 628; Elec.Code, § 3707); a county board of supervisors (*Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 134 Cal.Rptr. 36; Elec.Code, § 3711); and the Secretary of State of California (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 194 Cal.Rptr. 781, 669 P.2d 17; Elec.Code, § 3523); all have a mandatory duty to process and submit initiative and referendum measures. (See also *Yost v. Thomas* (1984) 36 Cal.3d 561, 564, fn. 2,205 Cal.Rptr. 801, 685 P.2d 1152.)

[1] We perceive no basis for distinguishing the case at bar from the foregoing authorities, and defendant has not suggested any. Hence we conclude the council had a mandatory duty either to repeal the challenged ordinances or to submit the ordinance to referendum unless "directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the [referendum] power." (*Farley v. Healey, supra,* 67 Cal.2d at p. 327, 62 Cal.Rptr. 26, 431 P.2d 650.) Having determined that the respondent city registrar exceeded his authority in withholding an initiative measure from the voters, the *Farley* court "deem[ed] it appropriate to determine whether the charter enables the electorate to adopt it." (*Id.,* at p. 327, 62 Cal.Rptr. 26, 431 P.2d 650.) Here, as in *Farley*, we "deem ****793** it appropriate" to determine whether respondent had made a "compelling showing that a proper case has been established for [judicial] interfer [ence]...." (*Ibid.*) That is the question to which we now turn.

II

Pre-Election Judicial Review

We recognize that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4, 181 Cal.Rptr. 100, 641 P.2d 200.) However, the courts have recognized two exceptions to the general rule limiting judicial review of ballot measures to post-election proceedings. The first is where the electorate lacks the "*power* to adopt the proposal in the first instance...." (*Id.,* at p. 6, 181 Cal.Rptr. 100, 641 P.2d 200; emphasis supplied.) "Thus, for example, election officials have been ordered not to place initiative and referendum proposals on the ballot on the ground that the electorate did not have the power to enact them since they were not legislative in character [citations], the subject matter was not a municipal affair [citations], or the ***1210** proposal amounted to a revision of the Constitution rather than an amendment thereto." (*Id.*)

The second exception to the general rule proscribing pre-election judicial review, and the one invoked by the council in the present case, is where the substantive provisions of the proposed measure are *legally invalid.*

"[E]ven if a proposed measure is within the scope of the initiative power, courts retain equitable discretion to examine the measure before the election upon a compelling showing that the substantive provisions of the initiative are clearly invalid. (See *Harnett v. County of Sacramento* (1925) 195 Cal. 676, 683 [235 P. 445]...; *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 255 [101 Cal.Rptr. 628] ...; Note, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L.Rev. 1717, 1725-1729.)" (*American Federation of Labor. v. Eu* (1984) 36 Cal.3d 687, 696, fn. 11,206 Cal.Rptr. 89, 686 P.2d 609.) We shall therefore proceed to consider the council's claim that the referendum would be "clearly invalid" if enacted by the voters.

III

Validity of the Referendum

State law prohibits enactment of a zoning ordinance that is not consistent with the general plan. (Gov.Code, § 65860.) Were the voters to repeal the zoning amendment at issue here, the result unquestionably would be a zoning ordinance inconsistent with the amended general plan. Hence the council contends that it has made the requisite "compelling showing that the substantive provisions of the [referendum] are clearly invalid." (*American Federation of Labor v. Eu, supra,* 36 Cal.3d at p. 696, fn. 11,206 Cal.Rptr. 89, 686 P.2d 609.) We agree.FN1

FN1. In view of our holding that repeal of the ordinances would result in a "clearly invalid" zoning scheme, we need not address real party's alternative argument that repeal would be invalid as arbitrary and discriminatory.

State law requires that the legislative body of every county and city "adopt a comprehensive long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Gov.Code, § 65300.) Proposed subdivisions, together with the provisions for their design and improvements must be "consistent with the general plan." (Gov.Code, § 66473.5.) County and city zoning ordinances must be "consistent with the general plan," as well. (Gov.Code, § 65860, subd. (a).)

The impact of the legislation (stats. 1971, ch. 1446, p. 2852) which imposed the requirement****794** that subdivisions and zoning ordinances be ***1211** consistent with the general plan has been widely noted: As this court, in *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 532, 160 Cal.Rptr. 907, stated: "In 1971 the Legislature enacted [Gov.Code, §§ 66473.5, 65860] which transformed the general plan from just an 'interesting study' to the basic land use charter governing the direction of future land use in the local jurisdiction.... *As a result,* general plans now embody fundamental land use decisions that guide the future growth and development of cities and counties. The adoption or amendment of general plans perforce have a potential for resulting in ultimate physical changes in the environment ..." (Emphasis supplied.)

In *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880, 170 Cal.Rptr. 342, the court noted the "combined effect" of the State Planning and Zoning Law, "which is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with the general plan." (See also *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533, 187 Cal.Rptr. 893.) One commentator has gone so far as to conclude: "The focus of the legislative scheme in California's modern statutes ... seems to be the requirement that the exercise of the police power in the zoning and land use area be *consistent* with the general plan." (Note, *General Plan* (1974) 26 Hastings L.J. 614, 622; emphasis supplied.)

The general plan is tremendously significant in shaping future development because land use decisions must be consistent therewith. "The immutable effect of the [general] plan with respect to individual landowners and the community in general is a result of the new requirement that city or county zoning ordinances be consistent with the general plan." (Note, *General Plan, supra,* at p. 627.) The consistency requirement has elevated the general plan from an "exhortation" to a "commandment." (*Ibid.*; see also Comment, *Zoning Shall Be Consistent with the General Plan-A Help or a Hindrance to Planning* ? (1973) 10 San Diego L.Rev. 901.)

In section 65860, subdivision (a), the Legislature mandated that all zoning shall be consistent with the general plan. In section 65860, subdivision (c), the Legislature added muscle to the provision by requiring that any ordinance which becomes *inconsistent* with the general plan *must* be brought into conformity. Subdivision (c) provides: "In the event that a zoning ordinance becomes inconsistent with the general plan by reason of amendment to such plan, or to any element of such plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as abridged." To further ensure consistency in land use decisions, the Legislature provided in section 65860, subdivision (b), ***1212** that "[any] resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a)." (See *City of Los Angeles v. State of California, supra,* 138 Cal.App.3d at p. 531, 187 Cal.Rptr. 893.)

[2] A zoning ordinance inconsistent with the general plan at the time of its enactment is "invalid when passed." (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, 179 Cal.Rptr. 261.)

[3] In view of the foregoing, we conclude that the invalidity of the proposed referendum has been clearly and compellingly demonstrated. Repeal of the zoning ordinance in question would result in the subject property being zoned for low density residential use while the amended plan calls for a higher residential density. Notwithstanding this fact, plaintiff urges that the voters should be permitted to enact an inconsistent zoning ordinance because section 65860, subdivision (c), provides for a "reasonable time" within which an inconsistent zoning ordinance may be brought into conformity with an amended general plan. Thus, plaintiff points out, even if the referendum were approved the council ****795** would have a "reasonable time" within which to rectify the inconsistency.

Plaintiff readily concedes some remedial action by the council would then be required. Plaintiff suggests that the council would have three options: (1) reenact the zoning amendment that the voters had overturned; (2) enact some alternative zoning scheme which is consistent with the general plan; and (3) amend the amended general plan to conform to the zoning ordinance preferred by the voters.

Unfortunately, all of the options offered by plaintiff beg the question of whether the voters, *ab initio,* have the right to enact an invalid zoning ordinance. Clearly, section 65860, subdivision (c), was enacted to provide the legislative body with a "reasonable time" to bring zoning into *conformity* with an amended general plan. It would clearly distort the purpose of that provision were we to construe it as affirmatively sanctioning the enactment of an *inconsistent* zoning ordinance.

An even greater distortion of legislation would result were we to approve the referendum on the ground that the council could subsequently amend the *general plan* to conform with the zoning approved by the voters. As is often noted, the general plan serves as the "constitution for all future developments within the City." (*O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283.) Unrestricted amendments of the general plan to conform to zoning changes would destroy the general plan as a tool for the comprehensive development of the community as a whole. (See Comment,***1213** *Zoning Shall Be Consistent with the General Plan-A Help or a Hindrance to Planning?, supra,* at p. 906); Williams, California Zoning Practice (Cont.Ed.Bar 1984 Supp.) § 2.29, p. 21. Indeed it was precisely to control such evasions, that the Legislature limited the number of amendments to the general plan which may be passed during any calendar year. (Gov.Code, § 65361; see Williams, California Zoning Practice, *supra,* at p. 21.)

[4] In sum, we conclude that the referendum, if successful, would enact a clearly invalid zoning ordinance. Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts. Nor are we persuaded that a zoning ordinance inconsistent with the general plan constitutes little more than a mere technical infirmity. On the contrary, the requirement of consistency is the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law. We are not persuaded that this principle must now be sacrificed on the alter of an invalid referendum.

DISPOSITION

The judgment is affirmed.

MORRIS, P.J., and KAUFMAN, J., concur.
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